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No. 751

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
CHICAGO GREAT WESTERN RAILWAY COMPANY,
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
OMAHA GRAIN EXCHANGE, *Appellants*

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
GREAT NORTHERN RAILWAY COMPANY,
NORFOLK AND WESTERN RAILWAY COMPANY,
NORTHERN PACIFIC RAILWAY,
SOO LINE RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court is reported at 242 F. Supp. 414, and is set forth as Appendix A to this Statement. The report of the Interstate Commerce Commission (which appears at 322 ICC 743) and the (unprinted) report of the Commission's Examiner are reproduced as Appendices C and D, respectively.

JURISDICTION

The three-judge court, in a decree entered on May 24, 1965 (Appendix B to this Statement) enjoined and set aside an order of the Interstate Commerce Commission, and appeals were noted by the Commission,[1] three railroads[2] (on July 20, 1965) and the Omaha Grain Exchange (on July 23, 1965), defendants who had intervened in the action in support of the Commission's order. By its order of September 17, 1965, the three-judge court extended until November 15, 1965 the time in which these defendants and the Interstate Commerce Commission (Appellant in No. ..., O. T. 1965) might docket these appeals and file this record. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b). *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534; *Atchison, T. & S.F. Ry. Co.* v. *United States*, 284 U.S. 248.

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[1] Appellant in No. ..., Oct. T. 1965.

[2] Chicago and North Western Railway Company; Chicago Great Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

STATUTES INVOLVED

Sections 4(a) and 10(e) of the Administrative Procedure Act (5 U.S.C. 1003(a) and 1009(e)) are set out in Appendix E to this Statement.

QUESTION PRESENTED

Before the Commission in five consolidated cases, representing over four years of litigation, were complaints that the "absolute rate-break" rule of the 1930's had outlived its utility and become an unreasonable regulation. The major national grain markets requested that the railroads be ordered to adopt radical changes in charges for distributing the nation's wheat from western farms to eastern markets. Recognizing the wrongs done by this rule (Appendix C at 770-775), the Commission ordered it vacated. Since the only persons subject to the rate-break rule (the railroads) were already parties to these proceedings, the Commission published no formal notice of proposed rule-making, which the lower court held a violation of Section 4(a) of the Administrative Procedure Act (5 U.S.C. 1003(a)). The significant question here is whether Section 4(a) of the Administrative Procedure Act was properly construed to require redundant notice of this proposed remedy before the Commission could grant the relief from the rule requested in these complaints.

STATEMENT

Five separate complaints, filed by major grain marketing associations representing hundreds of grain merchants,[3]

[3] Complainant Minneapolis Grain Exchange represented 510 members and 150 separate firms (Ex. 118, p. 2), Omaha Grain Exchange represented another 32 firms (Ex. 59, p. 2) and the other markets similarly acted on behalf of wide commercial memberships.

culminated in an order by the Interstate Commerce Commission vacating for the future its "absolute rate-break" rule. This rule required railroads to construct rates so as to equalize delivered grain prices in the east via eight western grain markets.

The absolute rate-break rule is no stranger to this Court. Fashioned first[4] by the Commission in response to the agricultural depression of the 1930's, it was remanded to the Commission for "staleness" of the evidentiary record in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U.S. 248. Contested again by the carriers (in *Board of Trade of Kansas City* v. *United States,* 314 U.S. 534), this Court accorded the Commission the widest possible latitude within which to attempt this acknowledged "experiment" in rate-making. Mr. Justice Frankfurter spoke for a unanimous Court when he held (314 U.S. 534 at 546-548) that:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.,* 310 U.S. 573, 581-82.
>
> * * * *
>
> ". . . Weighing the prospective gains and hurts which were part of all of the proposed remedies, the Commission decided upon the exclusive rate-break combination. It did so, however, with full recognition that the wisdom of its action had to meet the test of experience. Therefore, it treated its conclusion as part of a continuing process, and requested the parties to

[4] *Grain and Grain Products within the Western District,* 164 I.C.C. 619 (1930); *id.,* 205 I.C.C. 301.

give the system which it adopted a 'reasonable trial,' contemplating such further consideration as the practical operation of the system would require. The Commission refused the modifications asked by the appellants because the rate-break adjustment was 'entitled to a thorough test over an adequate period of normal conditions in the grain trade' and it had 'received no such fair test up to the present time.' To grant the requested modifications would 'break down the rate-break adjustment.' 229 I.C.C. 9, 15-16. These findings are incontestable.

"That the Commission itself was of divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure . . ."

Twenty-nine years later, when after many modifications[5] the Commission's Examiner found the absolute rate-break rule to be "an experiment shown to have failed,[6] "it was vacated in a proceeding brought by the ostensible beneficiaries of the rule, the grain shippers and merchants.

This I.C.C. order vacating the absolute rate-break rule was set aside by a three-judge reviewing court for failure of the Commission to advertise in the Federal Register the fact that vacation of the rule was being considered.

In all, five complaints were consolidated before the Commission, three specifically alleging the absolute rate-break

[5] Appendices D-8 and C at 753-755 explain these exceptions.

[6] Appendix D-23.

rule to be an unreasonable regulation,[7] reciting harm done to these major grain markets[8] by the rate-break rule and requesting the Commission to prescribe new regulations which would remove this unlawfulness. All railroads parties to this appeal were served and given an opportunity to defend the rule against this attack, and appellee railroads did so, in proceedings starting in June, 1960 and closing in June, 1961, almost a full year later. While these complaints and the evidence specifically and by name attacked the absolute rate-break rule as unreasonable regulation, no notice of this attack or the possible amendment or vacation of the rule was published in the Federal Register, as the lower court correctly observed. To have done so would have been contrary not only to Commission practice[9] but repugnant to common sense—the rule governed only the rail carriers, and they were there: over forty western railroads were named defendants and *all* appellees (who profess lack of "proper notice") were active day-by-day participants in the case.

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[7] See Appendix C at pages 776-777, setting out these allegations and the complaint of Atkinson Milling Co. (No. 33426) at counts V, VII, X, XVII and prayer.

[8] Seven of the eight "primary markets" (named and defined at note 12 on page 747 of Appendix C) were complainants here. See Appendix C at 776-777. Rates to and from the eighth primary market, Duluth, Minnesota, were specifically attacked in Dockets 33397 and 33469 (see Appendix D at pages D-23 and D-25).

[9] Precisely this practice was followed in over twenty years of cases (set out at pages 754 and 755 of Appendix C) where modification of this same rule was handled, as here, under specific complaint dockets.

From the first prehearing conference appellees acknowledged,[10] time and again,[11] that they knew the rule was in issue, and these appellees (defendants before the Commission) presented a complete defense of the rate-break rule, both in their evidential case and on brief.[12] Moreover, North Western's direct testimony (Ex. 119, pages 5 and 10) in 1960 actively advocated vacation of the rule throughout the West. There was no objection (R. 1250) to this testimony.

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[10] Mr. Asher, attorney for all appellees other than Soo Line, stated at page 7 of the Transcript of Proceedings at the prehearing conference: "Mr. Examiner, we feel that all five of these complaints involve one central issue, the present lawfulness of the absolute rate-break rule which was prescribed by the Commission in Docket No. 17,000 Part 7 investigation."

[11] The same attorney for these appellees (at page 27 of the Transcript of Proceedings at the hearing) again acknowledged that: "Mr. Examiner, I don't think there can be any question but what these complaints attack the absolute rate-break rule throughout the West. They are attacking the evidence, the tariff rule, which requires the rate-break to be maintained. That structure was prescribed after extensive hearings in the grain case."

[12] As appellees stated on page 7 of their brief to the Commission: "The defendants and the many interveners in opposition to the complaints have produced extensive evidence to prove that the conditions relevant to the absolute rate-break rule have not changed since the *Grain* case. This evidence shows that the primary markets continue to enjoy under the rate-break structure the same advantages over interior transit points which the Commission in the *Grain* case found to constitute a difference in conditions warranting the different treatment of interior transit points with respect to transit on indirect routes and that the primary markets under the rate-break structure have maintained their dominant competitive position."

Note carefully that appellees had every opportunity to examine, rebut, and argue (and did in fact argue against and reply to) North Western's request for this relief (stated in testimony, briefs and in exceptions to the Proposed Report) and that in oral argument to the Commission they were heard after North Western, to argue against this requested relief.

THE QUESTION IS SUBSTANTIAL

Considering the fact that the vacating order emanated from a proceeding before the Commission in which the grain markets and other parties requested precisely this relief and in which all railroads parties to this appeal were specifically named and active participants, this was an overly technical decision, we submit, one which perverts the purpose of Section 4(a), an important provision of the Administrative Procedure Act which has not yet received affirmative exposition by this Court. We submit that the decision below conflicts with the decisions of several circuits on this point, and that it is completely contrary to what Congress attempted to establish as minimum fair agency procedure, as shown by the legislative history of the Administrative Procedure Act.

1. Certainly this decision by the three-judge court could not have been reached had the rate-break complaints been tried originally in a civil case before a federal district court. Civil Rule 15(b) would have precluded any such result.[13] Moreover, the decisions prior to A.P.A.'s enact-

[13] Decisions there have settled well the "general rule * * * that a party cannot subsequently challenge an issue which is actually litigated if he has had actual notice and adequate opportunity to defend." *Branding Iron Club* v. *Riggs*, 207 F.2d 720, 724 (C.A. 10th 1953).

ment are completely contrary to the lower court's conclusion. One of the leading cases antedating the Administrative Procedure Act is *New York Central & H. R. R. Co.* v. *Interstate Commerce Commission,* 168 F.131 (C.C.S.D. N.Y. 1909), where the Court relied upon the general prayer for relief in the complaint as the basis for upholding an order which went well beyond issues presented by the complaint. The complaint had asked the Interstate Commerce Commission to fix a rate on *grain* from Chicago to New York. The Commission, however, did not fix a specific rate, but had entered a cease and desist order directing the defendant carriers to cease and desist from according a lower rate on *flour* than was imposed on grain. In denying an application for a preliminary injunction, the Court said at pages 138-39:

> "The Interstate Commerce Commission is * * * an administrative tribunal dealing with practical problems. So long as parties affected by its orders appear and are fully heard, we think it would be most unfortunate to deny its power to grant such relief as the facts shown upon the investigation should call for, even though such facts might be presented by evidence technically outside the issues raised. * * * Before we declare an order of the commission invalid as being outside the issues, we think that we should be satisfied that it is outside the issues actually presented to the commission and upon which the parties were heard."

Similarly, in *Tagg Bros.* v. *United States,* 280 U.S. 420 (1930), this Court upheld an order of the Secretary of Agriculture prescribing rates for services of the plaintiff market agencies at the Omaha Stockyards. The order was entered in a proceeding initiated by a notice of the Secretary under Title III of the Packers and Stockyards Act as an inquiry into the reasonableness of a new schedule of rates known as Tariff No. 2 which the market agencies had filed to supplant a schedule known as Tariff No. 1.

After hearings the Secretary prescribed a new schedule of rates. The plaintiffs contended the notice of the hearing did not apprise them of the Secretary's intention to fix a new schedule, but had led them to believe that if the rates in Tariff No. 2 were found excessive, Tariff No. 1 would be left in force; whereas the schedule of rates prescribed by the Secretary carried rates lower than those in Tariff No. 1. After pointing out that Title III of the Packers and Stockyards Act empowered the Secretary to prescribe new rates in an investigation made under that title, the Court declared at page 440:

> "The plaintiffs should have anticipated, therefore, that the Secretary would fix a new rate, if the evidence before him would lead him to believe that such a course was proper and desirable."

This comment is equally pertinent here. Appellees should have anticipated that if the Commission in the complaint proceedings should find that the rate-break rule was no longer necessary or desirable, it would make an appropriate amendment to its outstanding orders in Docket 17,000, Part VII, as was requested by the complaints, specific testimony and briefs.

While the lower court, in its holding that prior Federal Register publication was required to validate the Commission's action, relied upon "the limited area covered by the five complaints [as compared with the relief granted] throughout the entire Western district,"[14] rates to and from *all* of the eight rate-break markets were at issue throughout the I.C.C. proceeding.[15]

Duluth, the only non-complainant primary market, was specifically mentioned in two of the complaints, and rates to and through Duluth were litigated throughout the Commission record, but it could well have been eliminated

[14] Appendix A at page A-3. See also page A-4.

[15] See note 8, *supra* at page 6 of this Statement.

without any error intruding into the Commission's order. Many cases establish this proposition.

In *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572 (1950), this Court upheld an order of the Civil Aeronautics Board authorizing the establishment of airline routes which differed "markedly" from those prayed for in the application of Piedmont Aviation, Inc., one of the applicants in consolidated proceedings. After pointing out that the Piedmont application included a prayer for general and further relief, the Court said at pages 577-78:

> "While the routes sought by Piedmont did differ markedly from those awarded, they were all in the general area covered by the consolidated hearings. All twenty-five applicants had asked for routes somewhere in the area, and many of these routes overlapped. In such an area proceeding it would exalt imaginary procedural rights above the public interest to hold that the Board is hamstrung by the lack of foresight or skill of a draftsman in describing routes."

Similar in facts and identical in holding is *City of Dallas* v. *Civil Aeronautics Bd.*, 221 F.2d 501 (D.C. Cir. 1954), *cert. denied* 348 U.S. 914; cf. *United States* v. *Pierce Auto Lines*, 327 U.S. 515 at 523-525.

2. Nothing in the language of Section 4(a),[16] nor in the A.P.A.'s legislative history[17] mitigates against this common

[16] Section 4 provides:

> "(a) NOTICE.—General notice of proposed rule-making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

[17] Senate Document 248, 79th Congress, 2d Session.

sense reading of the Statute. [Then] Attorney General Tom C. Clark, in explaining to the agencies how to administer Section 4(a) analyzed it as follows:[18]

> "An agency contemplating the issuance of a rule subject to section 4(a) must publish in the Federal Register a notice of the proposed rule making, 'unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.' The reason for the quoted exception is to avoid burdening the Federal Register with notices addressed to particular parties who have been personally served or otherwise have notice. H.R. Rep. p. 51, fn. 8 (Sen. Doc. p. 285).[19] *For example, where a proceeding is commenced to establish rates for named carriers or utilities, if a notice complying with section 4(a) is personally served upon such persons, publication in the Federal Register is not required by the subsection.*" [Emphasis supplied.]

In fact, the legislative history and the contemporaneous construction of Section 4(a) argue strongly for a result contrary to that reached by the lower court. The Commission's consistent practice in administering this rule[20] likewise calls for a reversal, as do other recent federal decisions.[21]

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[18] *Attorney General's Manual on the Administrative Procedure Act* at page 28 (1947).

[19] This is a reference to the Legislative History cited at note 17, *supra*.

[20] See note 9 at page 6, *supra*.

[21] In a case with facts strikingly similar to these, *Air Line Pilots Ass'n. International* v. *Civil Aeronautics Bd.*, 215 F.2d 122, 124 (2d Cir. 1954), [then] Circuit Judge Harlan unhesitatingly sustained an agency order after finding (*id.* at 124) that:

> "Petitioners had actual notice of proposed rule-making and were afforded an opportunity, of which they

A strong argument can be documented for the proposition that the draftsmen of the Administrative Procedure Act intended in Section 4(a) simply to codify the decisions developing due process. The Act's floor leader, Senator McCarran, explained specifically that, like "a bill of rights," this legislation "is designed to provide guaranties of due process in administrative procedure,"[22] requiring agencies to give notice sufficient to "fairly apprise interested persons of the issues involved [in rule-making]."[23] Thus, while

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availed themselves, to participate in the proceedings through submission of written data, views, and oral argument."

Cf. *Florida Citrus Comm'n.* v. *United States,* 144 F. Supp. 517 (N.D. Fla. 1956), affirmed 352 U.S. 1021, where the three-judge court (at page 521) reached a comparable result through Section 10(e) of the Administrative Procedure Act:

> ". . . no prejudice is shown where, as in this case, the party complaining had actual knowledge of and participated in the administrative proceedings and he will not be heard to complain of the failure to give formal notice. *W. J. Dillner Transfer Co.* v. *United States,* D.C.W.D. Pa. 1951, 101 F. Supp. 506; *C. E. Hall & Sons, Inc.* v. *United States,* D.C. Mass., 1950, 88 F. Supp. 596. We think it doubtful that the hearings of the Commission in the proceeding we here consider [rate increase proceedings] were of the kind contemplated by the section of the Interstate Commerce Act requiring notice, but the absence of any showing of prejudice relieves us of the necessity to decide the point."

[22] Legislative History of the Administrative Procedure Act, S. Doc. 248, 79th Cong., 2d Sess. at page 298.

[23] Senate and House Committee Reports on Section 4(a) so state at pages 200 and 258 of the Legislative History, cited in note 22, *supra.*

Federal Register notice would indeed be useful to focus public interest on any proposal to vacate a rule *sua sponte*, it could serve no useful purpose in a case like this where the entire grain trade had already mounted an attack on the rule in proceedings to which all railroads regulated by the rule were active participants.

Since the Congress' understanding of due process must have emanated ultimately from this Court's construction of that concept, the decisions cited at pages 8-12 must, we submit, accurately state the law applicable to Section 4(a), and the *Attorney General's Manual*,[24] premised upon those decisions, must apply here. Both establish the error, we feel, in the lower court's requirement of redundant notice in proceedings already public, as were these cases.

Because the Administrative Procedure Act applies across the board to the activities of all agencies,[25] imputation of this erroneous standard to the statute raises a public law question of significant dimension. Since the decision below raises a serious conflict with appellate decisions elsewhere,[26] it is time, we submit, for this Court to resolve this question of minimum fair agency procedure.

CONCLUSION

Not just because this was "the *Grain* case," a proceeding of national commercial significance in its own right, nor because the lower court decided wrongly an issue of due process contrary to the courts of appeals from coast to coast, should the Court give plenary consideration to these

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[24] See page 12, *supra*, where the text is set out.

[25] *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 192.

[26] See pages 8-12 footnote 21 on page 12, *supra*.

appeals. Jurisdiction should be noted here and the appeals set for argument because the ideas of fair agency procedure imputed to the Administrative Procedure Act here will, unless overturned by this Court, hamstring the orderly administration of nationally significant issues.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al., vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION	No. 64 C 2014

MEMORANDUM OPINION

Before CASTLE, Circuit Judge, and PERRY and AUSTIN, District Judges.

PERRY, District Judge. Plaintiff railroads in this action under Sections 1336, 1398, 2284 and 2321 through 2325, inclusive, of Title 28, United States Code, seek to suspend, enjoin, annul and set aside the Interstate Commerce Commission's order of June 5, 1964, entered in proceedings designated before the Commission as Docket No. 17000, Rate Structure Investigation, Part VII, Grain and Grain Products Within the Western District and For Export, in so far as that order modifies previous orders in said proceeding dated October 22, 1934 and March 4, 1936. (Reference hereinafter made to "plaintiffs" will include those who have intervened as plaintiffs in this action.)

This cause came on for hearing before a duly designated three-judge statutory court which finds that it has jurisdiction of the subject matter hereof and of the parties hereto.

It appears that in 1959 and 1960 five separate complaints, presenting similar issues, were filed with the Interstate Commerce Commission and consolidated for hearing and disposition, and that after proceedings had, the Commission on June 5, 1964, filed its Report and entered its order.

On page 755 of its Report, the Commission said:

> "As indicated in appendix A, the complainants allege that the rate-break combinations applicable on certain grain shipments transited at the considered primary markets are unjust and unreasonable, unduly discriminatory, and subject the complainants to undue prejudice and disadvantage to the undue preference and advantage of other interior transit points and operators who are permitted to transit similar shipments at lower rates.
>
> "It should be stressed that the level of the considered rates is not in issue. Moreover, the complainants concede that on the great majority of the considered traffic, which flows from west to east, the normal drawing areas for each of the primary markets are territories from which there are no through rates by way of these markets less than the rate-break combinations, and therefore present no problem to the primary market. *However, it is contended that on a small but important segment of the traffic* the rates applicable on shipments transited at the primary markets subject those markets and the transit operators located thereat to an unreasonable handicap in competing with interior markets and transit operators. It is only in instances where a one-factor through rate from origin to transit destination, lower than the rate-break combination applicable on shipments transited at a particular primary market, applies through that primary market on shipments transited at interior points, that the rate-break combinations are alleged to be unlawful. Complainants seek transit on these lower rates through the primary markets. * * * " (Emphasis supplied)*

* See Board of Trade v. United States, 314 U.S. 534, for meaning of terms used in Commission's Report and order.

The Commission's order of June 5, 1964, here under attack, dismissed the complaints but it did not stop there. Although the considered rates applied only to limited and specified areas, and although the Commission's Report recognized that complainants' contentions related to a "small but important segment of the traffic," the Commission further ordered—

> "That the proceeding in Docket No. 17000, Rate Structure Investigation, Part VII, *Grain and Grain Products Within the Western District and for Export,* 205 I.C.C. 301 and 215 I.C.C. 83, be, and it is hereby, reopened for reconsideration, and that the orders entered therein, on October 22, 1934, and March 4, 1936, respectively, be, and they are hereby, modified so as to be vacated and set aside to the extent that they require observance of rate-break combinations and of proportional rates therein prescribed as the exclusive basis of charges on shipments of grain and grain products at points from which proportional rates are applicable,"

thus abolishing the absolute "ratebreak" rule not only as to the limited area covered by the five complaints but also throughout the entire Western district.

It appears that at no time did the Commission give any notice that it contemplated reopening Docket 17000, Part VII, nor did it give any notice in Docket 17000, Part VII of the proposed modification of the orders of October 22, 1934 and March 4, 1936 to make observance of the "rate-break" rule voluntary or permissive instead of mandatory throughout the entire Western district.

Plaintiffs base this suit on the failure of the Commission to comply (a) with Section 16(6) of the Interstate Commerce Act (49 U.S.C. §16(6) and (b) with Section 4 of the Administrative Procedure Act (5 U.S.C. §1003) which prescribes rulemaking procedures.

Plaintiffs do not gainsay the authority of the Commission to act or rule in the premises but contend that such action and ruling should have been preceded by notice in order to afford plaintiffs an opportunity to be heard and to present data on the question of the vacation of the absolute "rate-break" rule throughout the entire Western district. They contend that their arguments made and data presented before the Commission were confined to the places and traffic involved in the proceedings on the five complaints.

It is interesting to observe that the recommended Report and order prepared and filed by the Examiner, who held lengthy hearings in the matter of the five complaints, contains the following paragraph relating to the issues:

> "All of the complaints challenge the legality of charges on grain and grain products caused by the absolute rate-break rule with respect to certain of its applications at Minneapolis, Minn., and the lower Missouri River markets of Kansas City, Omaha and St. Joseph, Mo., and Kansas City, Atchison and Leavenworth, Kans. While one of the complaints attacks the lawfulness of the rule *per se,* the evidence is confined to specific rate situations. Only the lawfulness of these is considered herein. Relief is sought only as to existing rates and existing routes,"

to which limitation of the issues no exception was taken.

It appears that at one point during the proceedings before the Commission on the five complaints, the Secretary of Agriculture of the United States, an intervenor, requested that Docket 17000, Part VII, be included in the proceedings but the request was denied by the Commission.

> Re: Notice required by Section 16(6)
> of Interstate Commerce Act.

At page 775 of its Report the Commission said that its action in vacating the mandatory aspect of the rule was done pursuant to its authority under Section 16(6) of the Interstate Commerce Act. That section provides that "The

commission shall be authorized to suspend or modify its orders upon *such notice* and in such manner as it shall deem proper." (emphasis supplied) Clearly the giving of some form of notice is comtemplated by the statute.

Re: Notice required by Section 4 of the Administrative Procedure Act.

In Docket 17000, Part VII, the Commission prescribed a mandatory rule known as the "ratebreak system" which was in effect throughout the entire Western district. "'Rule-making' means agency process for the formulation, amendment, or repeal of a rule" (5 U.S.C. §1001(c)) and the Commission's action in modifying the orders in Docket 17000, Part VII, and making permissive or voluntary that which had theretofore been mandatory, constituted "rule-making."

Section 4(a) of the Administrative Procedure Act provides that

> "General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings . . ."

The order of June 5, 1964 does not come within any of the exclusionary provisions of Section 4 which excuse compliance with notice requirements.

Defendants contend that plaintiffs had sufficient actual notice. However, notice cannot be ascribed to these plaintiffs because they were present and participated in the five-complaint proceedings before the Commission. Parties to proceedings cannot be expected to grope through the litigation. These plaintiffs were entitled to clear, decisive notice of the Commission's contemplated enlargement of the issues in the proceeding and of the proposed amendatory action in Docket 17000, Part VII. We agree with Vice

Chairman Webb who stated in his dissent that "No segment of the grain trade and no carrier had any reason to suppose that any such drastic action was within the scope of this proceeding."

For reasons herein stated, the Court finds that the order of the Interstate Commerce Commission dated June 5, 1964, in the Commission's Docket 17000, Part VII, *Grain and Grain Products within the Western District and for Export,* to the extent that said order modifies prior orders in said Docket entered October 22, 1934 and March 4, 1936, is void and concludes that said order to the extent hereinabove specified must be vacated and set aside and its enforcement permanently enjoined, all without prejudice to further proceedings before or by the Interstate Commerce Commission not inconsistent with this opinion.

In arriving at our conclusions herein this court is not considering or passing on the question of whether orders of the Interstate Commerce Commission respecting freight rates applicable to grain or grain products, freight rates applicable or the rules governing such rates should be modified or changed in an appropriate proceeding by the Interstate Commerce Commission.

This memorandum opinion shall constitute the court's findings of fact and conclusions of law.

Judgment in accordance with opinion.

DATED: Chicago, Illinois,
May 24, 1965.

/s/ LATHAM CASTLE
United States Circuit Judge

/s/ JOSEPH SAMUEL PERRY
United States District Judge

/s/ RICHARD B. AUSTIN
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al., vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION	No. 64 C 2014

JUDGMENT ORDER

This cause having come on to be heard before a statutory three-judge court, and briefs having been submitted, the cause having been argued by counsel, and the court having on this date filed its memorandum opinion,

It is ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission dated June 5, 1964, in the Commission's Docket 17000, Part VII, *Grain and Grain Products within the Western District and for Export,* to the extent that said order modifies prior orders in said Docket entered October 22, 1934 and March 4, 1936, be and it is hereby vacated and set aside, and its enforcement permanently enjoined, all without prejudice to further proceedings before or by the Interstate Commerce Com-

mission, not inconsistent with this court's aforesaid memorandum opinion filed herein.

ENTER:

/s/ LATHAM CASTLE
United States Circuit Judge

/s/ JOSEPH SAMUEL PERRY
United States District Judge

/s/ RICHARD B. AUSTIN
United States District Judge

DATED: Chicago, Illinois,
May 24, 1965.

30169

INTERSTATE COMMERCE COMMISSION

No. 33171[1]

OMAHA GRAIN EXCHANGE v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

Decided June 5, 1964

1. Rates on grain and grain products, in carloads, required by or resulting from the absolute rate-break rule, on shipments transited at primary markets in the western district, found not shown to be unjust, unreasonable, or otherwise unlawful. Absolute rate-break rule found not shown to be unlawful. Complaints dismissed.
2. Notwithstanding findings in 1 above, absolute rate-break rule ordered vacated.

C. L. Brennan, Cyril J. Burrill, John B. Deininger, A. G. Grimm, Stanley J. Hillard, G. A. Johnson, J. A. Lynch, Wm. T. McArthur, L. D. Minard, E. F. Moberly, Wesley C. Newman, J. R. Scoggin, W. R. Scott, Bernard A. Springrose, N. K. Thomas, and Phil Wolters for complainants.

J. S. Chartrand, Samuel R. Freeman, James J. Irlandi, A. E. Leitherer, James R. Mann, Robert P. Post, and *R. W. Wigton* for interveners in support of complainants.

Peter W. Asher, Curtis H. Berg, J. A. Christiansen, John C. Danielson, Eugene S. Davis, Roy D. Erickson, Frank S. Farrell, James A. Gillen, Bryce L. Hamilton, L. S. Hamilton, Chester G. Hayes, Jr., William P. Higgins, H. W. Hotaling, Roland J. Lehman, James P. Lundy, Joseph J. Nagle, Edwin L. Ryan, Jr., Leo P. Sander, James M. Souby, Jr., James E. Steffarud, and *A. N. Tein* for defendants.

John M. Agrey, Freeman Bradford, F. V. Caesar, Byron M. Gray, E. J. Hanson, I. M. Herndon, J. W. Holloway, R. L. Holmes, Sylvester O. Moberly, Charley M. Pearson, and *Theodore H. Troxel* for interveners in support of defendants.

Jack W. Boehl and *Robert R. Kimmel* for the Secretary of Agriculture.

Theodore H. Troxel for Nebraska State Railway Commission.

[1] In addition to the title proceeding, this report embraces also those listed in appendix A hereto.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

These proceedings present similar issues, were heard on a common record, and will be disposed of in one report. Exceptions, and replies thereto, were filed by various parties to the examiner's recommended report and order which found application of the absolute rate-break rule at the points at issue to be in violation of sections 1 and 3(1) of the Interstate Commerce Act. We have heard the parties in oral argument. Our conclusions differ from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complaints are brought by various segments of the grain trade, including trade and marketing organizations and individual millers and shippers. While differing in scope, the complaints, set forth in appendix A hereto, attack the rates[2] on grain and grain products,[3] in carloads, required by or resulting from the application of the so-called absolute rate-break rule,[4] on shipments transited at certain primary or rate-break markets in the western district.[5] The involved primary markets include Atchison, Kansas City, and Leavenworth, Kans., Kansas City and St. Joseph, Mo., of which Kansas City, Mo., will be referred to as representative, Omaha, Nebr.,[6] and Minneapolis, Minn.[7]

The complainants name as defendants 41 rail carriers operating to, from, and within the involved territory. Eleven of these defendants[8] introduced evidence in opposition to the complaints.

[2]Rates are stated in cents per 100 pounds and reflect those shown of record without subsequent changes, if any.

[3]The grain and grain products under consideration herein are wheat; coarse grains including corn, oats, rye, and barley; grain sorghums; soybeans; and products thereof. The chief products are flour and animal and poultry feeds.

[4]The rate-break rule requires that from points from which proportional rates are published to a transit destination, the basis of charge, when transit is taken at such a point, shall be no lower than the proportional rate.

[5]Includes territory west of the Great Lakes and on and west of the Mississippi River, Illinois, and the Upper Peninsula of Michigan.

[6]Includes South Omaha, Nebr., and Council Bluffs, Iowa.

[7]Rates to St. Paul, Minn., are the same as those to Minneapolis.

[8]Atchison, Topeka and Santa Fe Railway Company (A.T.S.Fe), Chicago, Burlington & Quincy Railroad Company (C.B.&Q.), Chicago Great Western Railway Company (C.G.W.), Chicago, Milwaukee, St. Paul and Pacific Railroad Company (C.M.St.P.&P.), Chicago and North Western Railway Company (C.&N.W.), Chicago, Rock Island and Pacific Railroad Company (C.R.I.P.), Fort Worth and Denver Railway Company (Ft.W.&D.), Great Northern Railway Company (G.N.), Northern Pacific Railway Company (N.P.), Union Pacific Railroad Company (U.P.), and Wabash Railroad Company (WAB).

The C. & N. W., while opposing the complaints, seeks, in the alternative, vacation of the orders of this Commission in Docket No. 17000, Part VII. Numerous interested parties, including State commissions[9] and other agencies, intervened in support of[10] or in opposition to[11] the relief sought.

The Secretary of Agriculture requested that Docket No. 17000, Part VII, be reopened for further investigation.

Introduction.– Prior to setting forth the positions of the parties hereto and the evidence, a discussion of the considered traffic and the development of the present rate structure applicable thereon within the western district will be helpful to an understanding of the issues presented.

Grain is produced throughout the western district. Leading producers of wheat are the States of Colorado, Kansas, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Texas, and Missouri. Historically, the principal movement of wheat has been from the west through various primary markets to gateways such as Chicago and St. Louis, and thence to consuming areas in the East and South. In addition, a large volume of export wheat moves through the gulf ports. The coarse grains, principally corn and oats, are produced in large quantities in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota. Grain sorghums are produced in the greatest volume in Kansas, Nebraska, and Texas. Although there is some movement of coarse grains to the East, the greater movement is to the South and Southwest.

Transit.– Essentially, transit is the privilege of stopping a shipment at a point between origin and destination for some purpose incidental to manufacture or trade and reshipping it to its destination on the basis of the through rate. The circumstances attending the movement of grain differ in several respects from those affecting other commodities, particularly with respect to production, marketing, processing, and distribution. As a

[9]State Commissions appearing are The Nebraska State Railway Commission, as its interest may appear, and The State Corporation Commission of Kansas and The North Dakota Public Service Commission in support of the defendants.

[10]Included are Allied Mills, Inc., C. A. Krause Milling Company, Cargill, Incorporated, Chicago Board of Trade, Quaker Oats Company, and Sioux City Grain Exchange.

[11]Included are Chamber of Commerce of Fargo, N. Dak., Chamber of Commerce of Grand Forks, N. Dak., Evans Grain Company, Grain Merchants, Inc., Hutchinson Board of Trade, Indianapolis Board of Trade, J. Lynch & Company, Inc., The Kansas Milling Company, The Kansas-Missouri River Mills, North Dakota Mill & Elevator Association, Ross Industries, Inc., The Salina Board of Trade, Simpson, Laybourn, Miller & Stark, The Smoot Grain Company, Southern Minnesota Mills, and The Wichita Board of Trade.

result, the rail services provided under transit in connection with the movement of grain differ from those provided in connection with the movement of other traffic.

At the outset, it should be noted that the actual marketing and distribution of grain as well as the competitive factors pertaining thereto are extremely complex. Unlike other commodities, grain is produced by thousands of individual farmers located throughout the various production areas. It originates at numerous country stations and is shipped in great volume to a number of markets during the harvest season with little regard to immediate consumption requirements. The harvest seasons, which vary depending on the type of grain and the area of production, are relatively short, whereas the demand for grain remains fairly constant throughout the year. Thus, the grain trade must be ready to buy the grain when the farmer desires to sell, irrespective of current consumer demand. Accordingly, the excess grain shipped by the farmer must be stored until needed by processors and consumers. This storage is provided at elevators throughout the country, many of which are located at the primary markets. Since grain is a fungible commodity, the identity of specific carload lots disappears when the grain is placed in an elevator for storage. The tariffs providing for transit require the submission of an inbound freight bill when the outbound shipment from the transit point is tendered, but there is no requirement that the freight bill show, as the inbound origin, the actual origin of the particular grain in the outbound car.

Much of the grain must be processed prior to being used, as, for example, the milling of wheat into flour and the processing of coarse grains into commercial feeds. Accordingly, the movement of the grain from producer to consumer is interrupted. As noted, the grain harvested greatly exceeds the current market demand and is stored at various points, including country elevators behind the primary markets and at the markets themselves. There is a continuous movement of grain to, from, and through the primary markets. The transit arrangements make it possible for grain dealers and processors at the primary markets to store and process grain competitively with grain dealers and processors located at interior points and at the ultimate destinations.

The rate structure.– The grain rate structure is unique. It is based on the so-called rate-break system of rates as prescribed

in *Grain and Grain Products*, 164 I.C.C. 619 (1930), 173 I.C.C. 511 (1931), hereinafter referred to as the first *Grain* case, and *Grain and Grain Products*, 205 I.C.C. 301 (1934), 215 I.C.C. 83 (1936), hereinafter referred to as the second *Grain* case. The structure consists of combination rates which break at the primary or rate-break markets as well as at certain secondary markets or gateways.[12] The rate-break combinations consist of gathering rates from country origins to the primary markets, and inter-market proportional rates from one primary market to another primary market or from one primary market to a secondary market or gateway. There is also a second group of proportional rates from the primary or secondary markets to the consuming destinations or to ports for export.

The gathering rates are generally flat rates published as a local rate of a single carrier or a joint rate of two or more carriers, and are not dependent for application on any prior or subsequent transportation. The proportional rate is a local or a joint rate dependent for application upon (1) prior transportation to the point from which the proportional rate applies, (2) subsequent transportation from the point to which the rate applies, or (3) both. It is generally lower than a flat rate between the same points. An overhead rate with transit is a flat or proportional rate under which shipments may be stopped at an intermediate point for marketing, milling, storage, or other authorized transit purpose, and in absence of which the through charge would be the lowest combination of applicable rates to and from the transit point. A transit balance is an incident of an overhead through rate with transit. Shipments are generally billed inbound to the transit point at the flat rate. On the outbound shipment the amount paid is the difference between the through rate from origin to final destination and the flat rate from origin to transit point. This difference is known as the transit balance.

The absolute rate-break rule.—As indicated in the original report in the first *Grain* case, 164 I.C.C. 619, the rate-break plan (combinations of flat rates to and proportional rates from the primary markets) had existed for many years prior to that decision. The proportional rates were the result of the com-

[12] The primary or rate-break markets include Duluth and Minneapolis, Minn., Sioux City, Iowa, Omaha, Nebr. (includes South Omaha, Nebr., and Council Bluffs, Iowa), St. Joseph, Mo., Atchison and Leavenworth, Kans., and Kansas City, Mo.-Kans. The secondary markets or gateways include Milwaukee, Wis., Chicago and Peoria, Ill., St. Louis, Mo., Cairo, Ill., and Memphis, Tenn.

petition of carriers for shipments out of the primary markets of grain brought into those markets by lines with which they did not participate in overhead through rates with transit. For example, the Chicago Great Western, when it built into Omaha from Chicago, established as proportional rates from Omaha to Chicago the transit balances of through rates from west of Omaha to Chicago, with transit at Omaha, to which it was not a party. Similar proportional rates were established from and between the various markets by rail carriers whose lines did not run through a particular primary market.

In addition to the rate-break combinations through the primary markets, there were also published one-factor through rates. These through rates were on the combination basis, or lower than those combinations, from the same origins. As a one-factor through rate takes precedence over any combination of rates between the same points, the transit balances of these one-factor through rates took precedence over the higher proportional rates outbound from the same markets. Generally, shipments to the markets were billed in at flat rates. Whether shipments from markets were at proportional rates or transit balances depended upon the selection of the inbound freight bill. If the inbound bill covered a shipment from an origin point from which there was no overhead rate with transit to final destination, the outbound shipment was at the proportional rate. However, grain from a point from which there was no overhead rate with transit could be substituted[13] for grain from a point from which there was such an overhead rate with transit, and could be forwarded, upon presentation of the inbound freight bill covering inbound transportation from the latter point, at the transit balance due that freight bill. The publication of one-factor through rates resulting in transit balances less than the proportional rates between the same points became widespread. In addition to one-factor rates through the primary markets lower than the rate-break combinations, through rates were also published to equalize one primary market on an indirect route with the lower rate-break combination through another market on the direct route. Further, the proportional rates from one primary market to another were made applicable at an intermediate primary market in lieu of the combination of proportional rates to and from the intermediate market.

[13] As previously described, this substitution is allowed under the transit provisions as a result of the fungible nature of grain.

It was this widespread use of transit balances lower than the proportional rates between the same points that led to the prescription of the absolute rate-break rule.

In the original report in the first *Grain* case, 164 I.C.C. 619, it was concluded that the practice of contemporaneously charging both proportional rates and transit balances subjected the shipper under proportional rates to undue prejudice and gave the shipper under the lower transit balances an undue preference. It was provided that the through rates prescribed therein, on the basis of flat rates to the markets and proportional rates beyond, would be reasonable, and overhead through rates less than those combinations were ordered canceled.

In the interest of carrier competition, an exception to the rule for the exclusive application of the rate-break combinations on shipments through the primary markets was allowed. This exception provided for the application, in lieu of the rate-break combination through a given market, of a lower rate applicable over competitive routes between the same points, provided that no transit stop was made at any point on the equalized route (other than the rate-break market) which was not also a transit point on the cheaper route, and provided that no transit stop was made, under any circumstances, at the rate-break market on the equalized route.

In a supplemental report on further consideration, 173 I.C.C. 511, certain clarifications of the above findings were made. As indicated therein, the findings in the original report did not prohibit the application of joint rates through the primary markets and transit balances beyond the markets where proportional rates from the markets were not in effect. The requirement was that a proportional rate, once established, had to be charged, and could not be defeated by a lower transit balance between the same points. The rates as prescribed were set aside by the Supreme Court in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U.S. 248 (1932), because of a stale record.

In the second *Grain* case, 205 I.C.C. 301, the finding in the original report in the first *Grain* case that rate-break combinations were to be the exclusive basis of charge on shipments through the rate-break markets, when stopped at those markets, was affirmed. The reasons for this finding were stated on page 334 as follows:

The main reasons for the requirement of the exclusive application of the rate-break combinations were that transit balances less than the proportional rates out of the rate-break markets tended to disrupt the rate-break combinations, disorganize the general rate structure, make uncertain in advance the outbound basis of charge, give an undue preference to the users of transit balances over the users of proportional rates, depress the price of grain at the rate-break markets and, by direct reflection, at the country points, and reduce the revenues of the carriers.

In a supplemental report on further hearing in the second *Grain* case, 215 I.C.C. 83, certain modifications of the previous findings were made. It was determined that the rate-break combinations would be the exclusive basis of charge on all shipments through those markets. In addition, it was concluded that the main purpose of the previous findings in respect to the rate-break combinations would not be defeated by so broadening the exception to meet carrier competition as to permit transit, in the discretion of the carriers, at interior points on a route through a rate-break market on the basis of a lower rate in effect over a competing route between the same points in order to equalize those points with transit points on the cheaper route, regardless of whether the interior transit points on the equalized route are also transit points on the cheaper route. However, the application of the rate-break combinations was retained on all shipments stopped in transit at the rate-break market on the higher route.

This modification was based on the fact that there was a substantial difference in the effect of the transit operation under the two bases of through charges due to the inherent difference in the character of the one-factor through rates with transit and the rate-break combinations. As indicated therein, transit under the former is usually confined to points situated on reasonably direct routes and in the absence of carrier competition the basis of charge for shipments over markedly circuitous routes is frequently the rate over the direct route plus an out-of-line charge, or is a combination of locals. In addition, the outbound shipment from the transit point is usually held to the rails of the inbound carrier when the one-factor through rate is over one line or to the rails of the carrier participating with the inbound carrier in a joint rate through the transit point when the transportation is over more than one line. Thus, transit places a decided limitation upon the freedom of interchange of shipments between carriers out of a transit point.

Conversely, through rates resulting from the rate-break combination are not affected by such restrictions, either as to circuity or choice of outbound carrier. The proportional rate becomes applicable upon surrender of a freight bill covering the required amount of inbound tonnage from any origin. Moreover, the proportional rates are applicable over all the lines from the markets to all destinations to which published. Through rates less than the combinations of locals on the primary markets are therefore available to transit operators at those markets on all shipments to all destinations to which the proportional rates are published from all origins and over all routes through these markets, no matter how circuitous.

It was also concluded that the proportional rates are of special benefit to the price registering markets, such as Chicago, Kansas City, and Minneapolis, as a price stabilizer because the known equality of the outbound charges enables grain dealers there to compete on an equality in the purchase of grain at country origins. This benefit would not be possible under one-factor through rates with transit and varying transit balances.

It was further determined that the above modification would remove discrimination among the various competing interior transit points resulting from the availability of transit at interior points which are transit points both on the direct and indirect routes while interior points located on the indirect routes but not transit points on the direct routes were denied such transit. As indicated therein, the transit operator at the rate-break market on the equalized route would not be relatively more affected by transit at interior points on that route than by transit points on the cheaper route. Nor would his competitive situation be changed in those instances in which transit had been accorded at interior transit points on the normal route through the rate-break market as a result of diversion of the shipment over an available route that barely skirts the outer edge of the rate-break market in order to escape the requirement of the exclusive application of the rate-break combination.

In *Grain Case Modifications*, 223 I.C.C. 235 (1937), the rail carriers were permitted, for a limited period of time and because of extraordinary conditions then prevailing, to authorize transit at rate-break markets, from which proportional rates were applicable, on all rates, overhead or proportional, which applied through the rate-break market. Upon the failure of the carriers to establish the authorized transit, petitions were filed by

various interests in the grain business for an affirmative and permanent order, and in a report on reargument, 229 I.C.C. 9 (1938), the Commission declined to grant such relief, stating that the temporary permission would be allowed to expire on December 1, 1938. In another report on reargument, 231 I.C.C. 793 (1939), the findings in the prior report on reargument were affirmed. This action was upheld by the Supreme Court in *Kansas City Board of Trade* v. *United States*, 314 U.S. 534 (1942), hereinafter called *Board of Trade*.

General results of the revision.—In prescribing the rate-break plan, reasonable through rates were first determined from origin key points to the final markets over the direct routes through the primary markets. These rates were then broken back into gathering rates to the primary markets and proportional rates beyond, on the basis of average relative mileages, resulting in proportional rates approximating the average transit balances that would have resulted if one-factor through rates with transit, in lieu of rate-break combinations, had been prescribed. Generally, the governing bases of rates from origins in Colorado, Kansas, parts of southern Nebraska, Oklahoma, and parts of Texas are the gathering rates to Kansas City.[14] To the eastern gateways of Chicago and St. Louis, as well as to points beyond, the lowest rates are the Kansas City combinations. The rates from Nebraska origins are generally dominated by the Omaha combinations. There is a certain amount of equalization of the rates through these markets resulting from equal gathering rates to, and equal proportional rates from, these markets to a particular point. In other instances, a difference in the gathering rates to these respective markets is offset by the difference in the proportional rates from the markets to a particular point. Generally, the governing bases of rates from North Dakota and Montana are the gathering rates to Duluth, Minn., and Minneapolis which are equal as are the combinations over these primary markets to the eastern gateways of Chicago and St. Louis. There are, however, certain areas in southern North Dakota where the gathering rates to Minneapolis are lower than those to Duluth. In many areas of Montana the gathering rates to Sioux City, Iowa, equal those to Minneapolis. However, the proportional rates from Sioux City are higher to Chicago but lower to St. Louis than those from Minneapolis. From northern

[14] The rates to the lower Missouri River markets are generally the same rate bases as those to Kansas City. As previously indicated, reference to Kansas City will include the other lower Missouri River markets.

Minnesota the gathering rates to Duluth are lower than those to Minneapolis. In certain areas of southwestern Minnesota and parts of South Dakota, the gathering rates to Sioux City are equal to or lower than those to Minneapolis. On movements to the south and southwest, the rates are dominated by the Kansas City and St. Louis combinations.

Exceptions to the rate-break rule.—The absolute rate-break rule has never been universally applicable on grain and grain products. It never has applied on export traffic which amounted to 441,806,000 bushels in 1958. In recognition of the fact that such an extensive rate structure cannot be made perfect or permanent in any real sense and to overcome certain difficulties demonstrated by experience, the Commission from time to time has granted relief from the application of the rule, in addition to the exception relating to export traffic.

In the second *Grain* case, the proportional rates between Chicago, Peoria, and St. Louis were ordered canceled because the rate-break combinations were unduly burdensome to industries at such points. In *Wheat Products from Twin Cities to Chicago*, 218 I.C.C. 27 (1936), transit was permitted at Minneapolis on wheat on the proportional rate from Duluth to Chicago and related gateways. Subsequently, this exception was extended to coarse grains in *Grain Case Modifications*, 231 I.C.C. 793.[15] In *Southwestern Millers' League* v. *Atchison, T. & S. F. Ry. Co.*, 227 I.C.C. 795 (1938), 231 I.C.C. 130 (1938), proportional rates were prescribed from Chicago to central territory, differing on shipments originating in northwestern and trans-Mississippi territories, in order to preserve an equalization of rates through Chicago from Minneapolis and the Missouri River markets that had existed for many years. In *Grain to, from, and within Southern Territory*, 259 I.C.C. 629 (1945), the method of constructing through rates to the south by combinations of local or proportional rates to the river gateways and proportional rates beyond was found reasonable.

There is extensive equalization of rates through the gateways on the Ohio and Mississippi Rivers from Cincinnati on the east to Memphis on the south. This equalization was brought about by the rail carriers through a complicated system of adjusting the inbound and outbound rates. These adjustments were made by the establishment of varying proportional rates lower than the normal proportional rates from the various gateways. On grain from the

[15] The exception was also extended to malt in *Transit on Malt at Twin Cities*, 289 I.C.C. 485 (1953).

Southwest to the South, the through rates are constructed as combinations over the Mississippi River crossings which are equalized to some extent. One-factor through rates were effected in some instances, such as from southern Kansas to Memphis, which were lower than the rate-break combinations on Kansas City, and provision was made for transit at the latter point. The proportional rates, lower than the flat rates, from origins in southern Kansas, Oklahoma, and Texas to various river crossings approved in the above proceeding were, however, ordered canceled in *Kansas State Corp. Comm.* v. *Atchison, T. & S. F. Ry. Co.*, 289 I.C.C. 553 (1953), and in *Kansas Corp. Comm.* v. *Atchison, T. & S. F. Ry. Co.*, 301 I.C.C. 703 (1957). Appeals were taken by various parties to the United States district courts in both Kansas and Oklahoma. The order entered in 301 I.C.C. 703 was sustained by the Kansas court in *State Corp. Comm. of Kansas* v. *United States*, 184 F. Supp. 691 (1959). However, in *State of Oklahoma* v. *United States*, 193 F. Supp. 261 (1960), the District Court for the Western District of Oklahoma remanded the proceeding to this Commission. On further hearing, we affirmed the 301 I.C.C. 703 findings in *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.*, 321 I.C.C. 519 (1964). The proceedings therein are now pending on petitions for reconsideration and further hearing, together with an embraced request by numerous parties for vacation of the outstanding orders in Docket No. 17000, Part VII. Among the parties seeking such action are Pillsbury, a complainant herein, and a number of interveners herein in support of complainants and defendants. In *Royal Feed & Milling Co.* v. *Arkansas & L. M. Ry. Co.*, 281 I.C.C. 145 (1951), Memphis was allowed to transit on the rates from Kansas City and points basing thereon from certain origins in southern Kansas to certain destinations in Arkansas and Louisiana and to Vicksburg and Natchez, Miss. In *St. Joseph Grain Exchange* v. *Alabama, T. & N. R. Co.*, 291 I.C.C. 558 (1954), transit was permitted at Omaha on the Kansas City combinations to St. Louis from certain origins in Nebraska on traffic to the Southeast in order to equalize Omaha with Kansas City and the other lower Missouri River markets after modifying the application of the varying proportional rates beyond St. Louis. In a fifth supplemental report in *Grain and Grain Products*, 298 I.C.C. 261 (1956), the order prescribing the absolute rate-break rule on coarse grains was lifted. However, with certain exceptions, the defendants have continued to maintain the rate-break combinations on coarse grains and, as a result, these rates are under attack herein. In *Merchants' Exc. of St. Louis* v.

Alton & S. R., 299 I.C.C. 167 (1956), St. Louis was given transit on proportional rates from Kansas City to the Southwest similar to Memphis. In numerous instances, relief sought from the absolute rate-break rule has been denied.[16] Certain of those rate situations are in issue herein.

ISSUES INVOLVED

Complainants' contentions.—As indicated in appendix A, the complainants allege that the rate-break combinations applicable on certain grain shipments transited at the considered primary markets are unjust and unreasonable, unduly discriminatory, and subject the complainants to undue prejudice and disadvantage to the undue preference and advantage of other interior transit points[17] and operators who are permitted to transit similar shipments at lower rates.

It should be stressed that the level of the considered rates is not in issue. Moreover, the complainants concede that on the great majority of the considered traffic, which flows from west to east, the normal drawing areas for each of the primary markets are territories from which there are no through rates by way of these markets less than the rate-break combinations, and therefore present no problem to the primary market. However, it is contended that on a small but important segment of the traffic the rates applicable on shipments transited at the primary markets subject those markets and the transit operators located thereat to an unreasonable handicap in competing with interior markets and transit operators. It is only in instances where a one-factor through rate[18] from origin to transit destination, lower than the

[16] Proceedings include *Kansas City Board of Trade* v. *Atchison, T. & S. F. Ry. Co.*, 256 I.C.C. 457; *Kansas City Board of Trade* v. *Chicago, R. I. & P. Ry. Co.*, 256 I.C.C. 518; *Kansas City Board of Trade* v. *Missouri Pac. R. Co.*, 256 I.C.C. 603; *King Midas Flour Mills* v. *Northern Pac. Ry. Co.*, 306 I.C.C. 723; and *Bartlett & Co.* v. *Abilene & S. Ry. Co.*, 311 I.C.C. 307, 314 I.C.C. 139.

[17] For facility of discussion the following interior points will be used as representative of those involved: Hastings, Fremont, Lincoln, and Nebraska City, Nebr., Hutchinson, Salina, Topeka, and Wichita, Kans., Cedar Rapids, Des Moines, Mason City, and Sioux Falls, Iowa, and Mankato and Winona, Minn.

[18] The through rate may be a gathering rate from a country origin over the direct route to a primary market, made applicable on shipments transited at interior markets located on an indirect route through a second primary market, lower than the rate-break combination from that origin to the primary market over the second primary market; or it may be a proportional rate from one primary market over the direct route to a second primary market or gateway, made applicable on shipments transited at interior transit points on the indirect route through a third primary market lower than the rate-break combination over the third primary market. In addition, there are some one-factor through rates from origin to ultimate destination.

rate-break combination applicable on shipments transited at a particular primary market, applies through that primary market on shipments transited at interior points, that the rate-break combinations are alleged to be unlawful. Complainants seek transit on these lower rates through the primary markets.

Representative examples of the rates under attack herein are set forth in appendix B. As indicated therein, the greatest disadvantage to a particular primary market generally arises when grain from country origins is transmitted at a primary market for reshipment to a second primary market or when grain is drawn from one primary market to a second for transit and reshipment to a market, gateway, or destination. There are, however, as indicated in appendix B, instances where the through rates from origin to destination are less than the rate-break combinations.

The following examples illustrate the basic problem presented herein. The gathering rates from Hastings to Kansas City and Omaha are 33 and 29 cents, respectively. The proportional rate between Kansas City and Omaha is 14 cents. Grain moving from Hastings to Kansas City, which was transited at Lincoln or Nebraska City would be subject to a one-factor through rate of 33 cents. However, under the absolute rate-break rule, similar shipments transited at Omaha would be subject to a combination rate of 43 cents (29 and 14 cents). Similarly, the proportional rate from both Kansas City and Omaha to Chicago is 32.5 cents. Under the absolute rate-break rule, dealers at Kansas City and Omaha must pay a combination rate of 46.5 cents (14 and 32.5 cents) when drawing grain from the other market for transit and reshipment to Chicago. The 32.5-cent proportional applies over numerous direct routes from these markets to Chicago as well as numerous indirect routes from each of these markets through the other to Chicago. Transit is permitted on the 32.5-cent rates at interior markets on the direct routes and at interior markets on either side of Kansas City and Omaha on the indirect routes through these markets. In many instances, the distance through the interior market exceeds that through the primary market.

The complainants do not seek new rates or routes, but seek only transit on the lower rates through the primary markets which is now available to the interior points. According to the complainants, such privileges would in no way affect the great majority of the traffic which would continue to move under the rate-break combinations. Nor do they attack the gathering or proportional rates but, on the contrary, favor the retention of those rates with transit.

In addition to attacking the rates as described, certain complainants allege that the absolute rate-break rule, which applies only on shipments transited at the primary markets out of the numerous transit points in the western district, is an unjust and unreasonable regulation. Complainants stress that at its inception the absolute rate-break rule was experimental in nature and has never been justified on any permanent basis. It is their position that a general and permanent regulation which results in higher rates to a small number of shippers and localities without any relation to the services rendered is unlawful.

Defendants' contentions.—The defendant carriers contend that the absolute rate-break rule is both lawful and advantageous to the primary markets. They further assert not only that the complainants have failed to show any circumstances or competitive harm that would justify the relief sought herein, but that the primary markets have a dominant share of the traffic under the rate-break system.

Of major concern to the defendant carriers is the effect that granting of the requested relief would have on the various shippers and carriers. It is asserted that such relief would reestablish the dual rate system of transit balances and proportional rates causing revenue losses to the rail carriers, bring competitive injury to shippers at interior transit points, and break down the grain-rate structure.

Contrary to the position of the complainants that the majority of the traffic, which moves from west to east, would continue to move under the rate-break combinations, the defendants assert that the granting of the relief sought herein would lead to a breakdown of the rate structure. They foresee that carriers not serving the territory west of the primary markets would be forced to publish varying proportionals from the primary markets to remain competitive. These basic contentions are reiterated in the exceptions of defendants and supporting interveners to the hearing examiner's recommended report and order.

THE EVIDENCE

Omaha draws grain from Colorado, Kansas, Nebraska, and Wyoming as well as Idaho, Minnesota, Missouri, and South Dakota. Eighty percent of the total wheat production of Nebraska takes place in the areas where the gathering rates to Kansas City, available at the interior Nebraska points, are less than the Omaha

combinations. The production areas in these other States from which the interior transit points enjoy a rate advantage are also important sources of grain. Numerous commercial witnesses located at Omaha indicated that most of their competition comes from such points as Fremont, Grand Island, Lincoln, and Nebraska City which enjoy rate advantages as a result of the rule. These witnesses together with other millers and shippers located at the lower Missouri River markets which compete with interior points on both sides of the markets testified that under the present rates they cannot compete with competitors at the interior points. Several witnesses testified that as a result of their competitive position they were forced to construct facilities at points enjoying lower rates. To illustrate this competitive situation, it is shown that during the week of October 24, 1960, the cash price of wheat at Omaha was about 2.5 cents per bushel less than the Kansas City price. However, the 14-cent proportional rate between Omaha and Kansas City would require a market difference of approximately 8.5 cents per bushel. As further evidence of their competitive difficulties, the complainants show that the receipts of all Nebraska wheat at Omaha dropped from 54 percent in 1936 to 27 percent in 1959. From 1950 to 1959, the wheat receipts at Omaha and St. Joseph fell from 33,019,914 and 17,324,000 bushels, respectively, to 20,053,916 and 13,187,660 bushels, respectively. From 1935 to 1959, the Kansas City Grain Exchange's share of the total production of wheat in Colorado, Kansas, and Nebraska, which amounted to 101,947,000 bushels in 1935 and 332,253,000 bushels in 1959, fell from 48.75 percent to 23.80 percent. The total wheat receipts at Kansas City in 1935 were 49,701,000 bushels as compared with 79,342,000 bushels in 1959. The wheat receipts at Enid, Hutchinson, Salina, Topeka, and Wichita totaled 55,400,000 bushels in 1935 as compared with 230,666,000 bushels in 1959. Although the percentage increase at these interior Kansas markets far exceeded that at Kansas City, in no case do the receipts at an interior market equal those at Kansas City.

Complainants also set forth a number of changes, purportedly in transportation conditions, since the rule was originally prescribed. Among these changes is the large growth of storage facilities at the interior markets. A comparison of these facilities at the various markets in 1935 with 1959 is set forth in appendix C. Also set forth therein is the amount of Commodity Credit Corporation grain stored at the various markets, the remaining storage capacity for free grain, and the 1959 grain receipts of the

individual markets which were taken from the various exhibits of record. Most of the complainants concede that the growth of elevator storage capacity at the interior markets is not due solely to the absolute rate-break rule, but contend that this growth is a factor which warrants relief from the rule. Although the present storage capacity at various interior markets approximates and in some instances exceeds that at certain of the rate-break markets, this was also true in 1935, as shown in appendix C. The evidence of record establishes that many factors are considered in determining the location of storage elevators, including proximity to the production areas and cost factors, such as the price of real estate. The evidence further establishes that the growth at the interior markets is due in large part to the activities of the Commodity Credit Corporation in purchasing and storing surplus grain without particular regard to grain rates. As shown in appendix C, large quantities of Commodity Credit Corporation grain are stored at both the interior and rate-break markets. As further shown therein, the storage capacity at various interior markets of free grain exceeds that capacity at certain of the rate-break markets. However, the actual grain receipts at the various rate-break markets actually exceed in many instances the receipts at the interior points.

Under the rate-break system the primary markets enjoy a dominant share of the traffic as shown by the defendant carriers' one-percent waybill study based on 1959 data of the volume of grain transited at the primary markets in comparison with that transited at the interior points when destined to Chicago, St. Louis, and destinations in official and southern territories. A similar study was made on traffic to Iowa, Illinois, Missouri, and Wisconsin. These data show that on traffic destined to official and southern territories 41.9 percent of the total amount shown to be originated in Colorado and Nebraska was transited at the lower Missouri River markets as compared with 58.1 percent at the interior points in those States. Of the amount transited in Nebraska, 41.9 percent was transited at Omaha as compared with 58.1 percent at the interior Nebraska transit points. Of the total volume transited in Minnesota, North Dakota, and South Dakota, 61.9 percent was at Minneapolis as compared with 38.1 percent at the interior points in those States. On traffic terminated in Iowa, Illinois, Missouri, and Wisconsin, the lower Missouri River markets transited 52.5 percent as compared with 47.5 percent at interior points in Colorado and Kansas. At Omaha, the percentage

is 58.7 percent as compared with 41.3 percent at interior Nebraska points. Minneapolis transited 63.1 percent as compared with 36.9 percent at the interior points in Minnesota, North Dakota, and South Dakota. A similar study was made of the amount of grain transited at the various primary markets in comparison with that transited at interior points east of the markets on grain moving from origins west of the markets to Iowa, Illinois, Missouri, and Wisconsin. Some 19,552,781 bushels were transited at the various primary markets as compared with 6,324,429 bushels at various interior points.

As indicated in appendix A, the through rates on which the complainants are seeking transit have extensive application. Since these through rates are lower in varying degrees than the rate-break combinations applicable on shipments transited at the primary markets, the resulting transit balances would necessarily be lower in varying degrees than the proportional rates. For example, the transit balances to Kansas City from Omaha on traffic from various Nebraska origins would range from 0 to 14 cents as compared to the Omaha-Kansas City proportional rate of 14 cents. Zero transit balances would result in all instances where the gathering rates from the country origins to both of these markets are the same. A comparison of the present proportional rates from Kansas City, Omaha, and Minneapolis to the gateways of Chicago and St. Louis, with the range of representative varying transit balances, is set forth in the table below.

Movement	Proportional rate	Transit balances	
		Highest	Lowest
Kansas City to Chicago	32.5	30.5	18.5
Kansas City to St. Louis	25	23	0
Omaha to Chicago	32.5	25	18.5
Omaha to St. Louis	29	13.5	13.5
Minneapolis to Chicago	27	24.5	7.5
Minneapolis to St. Louis	39.5	29.5	17.5

These examples indicate that a large range of transit balances would become available at the indicated primary markets.

The transit arrangements requested by the complainants at one primary market to a gateway would apply not only on billing representing traffic drawn to the first market from the second market, but also on billing representing traffic drawn to the first market

from country origins from which the rate to the first market is the combination over the second. For example, shipments from Omaha to Chicago transited at Kansas City move under a combination rate of 46.5 cents (14 to Kansas City, 32.5 cents beyond). Kansas City seeks transit on the Omaha-Chicago proportional of 32.5 cents, which would result in a transit balance of 18.5 cents. However, an inbound freight bill from Grand Island, Nebr., to Kansas City direct would produce the same transit balance beyond Kansas City to Chicago as would a freight bill showing Omaha as the origin because the rate from Grand Island to Kansas City is the Omaha combination made up of the rate from Grand Island to Omaha, 27 cents, and the Omaha-Kansas City proportional rate, 14 cents.

In addition, varying transit balances would result on traffic drawn to the primary markets directly from country origins from which the rate to the primary market is not a combination over a second market through the operation of rule 56(b) of Tariff Circular 20 authorizing the reduction of rates higher than the aggregate of intermediates to the latter level. For example, from Holdrege, Nebr., to Chicago the rate of 66 cents is made by combination over Omaha (33.5 cents to Omaha and 32.5 cents beyond). The combination over Kansas City is 70 cents (37.5 to Kansas City and 32.5 cents beyond). If Kansas City obtains transit on the Omaha-Chicago proportional rate, it could draw Holdrege grain out of storage in Omaha or Holdrege grain routed through Omaha for reshipment to Chicago on the basis of the Omaha combination. Thus, the through charge on grain from Holdrege to Chicago on routes through Omaha or Kansas City would be 66 cents, while the through charge on this traffic through Kansas City on routes not through Omaha would be 70 cents. Rule 56(b) would make the 66-cent Omaha combination applicable over the Kansas City routes not through Omaha, thereby producing at Kansas City transit balances of 28.5 cents.

Under the present transit provisions, which require the same inbound and outbound carrier on shipments transited at the interior points, the drawing areas of such interior points as Enid, Hutchinson, Salina, and Wichita are far smaller than that of Kansas City. This is also so at interior points in Nebraska in relation to Omaha and those in the Northwest in relation to Minneapolis. While the interior points west of the markets cannot draw grain from producing areas east of these points, the latter restrictions are the result of geographical location. For the most part, under the rate-break system, Kansas City has equal rates with various interior points, whose rates are based

on the Kansas City combinations, on movements from Colorado, Kansas, and Nebraska to the Southwest. In certain instances, however, the distance through Kansas City exceeds that through various interior transit points. For example, the average direct docket 28300 mileage from 22 origins in Kansas to Fort Worth, Tex., is 561 miles. The average mileages from these origins through Enid, Salina, Topeka, and Wichita are 562, 623, 730, and 570 miles, respectively, whereas through Kansas City the average mileage is 779 miles.

An important factor in considering the effect that the transit arrangements requested by the complainants would have on the present rate structure is the substitution of billing.[19] Set forth in the table below is a comparison of the total charges accruing to defendants on two separate shipments transited at Omaha under the rate-break combinations with those applicable on those two separate shipments if Omaha were allowed to transit on the 32.5 cent Sioux City-Chicago porportional rate and on the 37.5-cent gathering rate from Holdrege to Kansas City.

Present rates:		
No. 1:		
Holdrege, Nebr., to Chicago, Ill., transited at Omaha, Nebr.:		
Holdrege to Omaha	33.5 cents	
Omaha to Chicago	32.5 cents	66 cents
No. 2:		
Sioux City, Iowa, to Kansas City, Mo., transited at Omaha, Nebr.:		
Sioux City to Omaha	7.5 cents	
Omaha to Kansas City	14.0 cents	21.5 cents
Total charging accruing to defendants		87.5 cents
Proposed rates:		
No. 1:		
Holdrege, Nebr., to Chicago, Ill., transited at Omaha, Nebr.:		
Holdrege to Omaha	33.5 cents	
Omaha to Chicago	25.0 cents[1]	58.5 cents
(With Sioux City billing)		

[19] As previously discussed, the fungible nature of a particular grain makes it impossible to continue the identity of specific carload lots or origins once the grain is placed in an elevator for storage.

No. 2:		
Sioux City, Iowa, to Kansas City, Mo., transited at Omaha, Nebr:		
Sioux City to Omaha	7.5 cents	
Omaha to Kansas City	4.0 cents[2]	11.5 cents
(With Holdrege billing)		
Total charging accruing to defendants		70.5 cents

[1]Sioux City-Chicago proportional rate (32.5 cents), less Sioux City-Omaha proportional rate (7.5 cents).

[2]Holdrege-Kansas City gathering rate (37.5 cents), less Holdrege-Omaha gathering rate (33.5 cents).

As indicated above, under the present rate structure, a switch of its inbound freight bills by a transit operator in Omaha could not reduce the charges because the respective proportional rates remain the same regardless of the origin shown on the bills used to support the outbound movements. However, if the transit operators at Omaha were granted transit as requested, by applying the Sioux City bill against the Holdrege tonnage and by applying the Holdrege bill against the Sioux City tonnage they could defeat the proportional rates and reduce their total charges. That the identity of the grain is not required to be maintained does not affect the substitution of billing since the lack of identity of the grain necessarily implies substitution. Nor do price considerations prevent such switching of freight bills. In this regard, however, complainants point out that the principal movement of wheat is west to east, and that all rates to the east base on Chicago to which point the proportional rates from Kansas City, Omaha, and Sioux City are the same. Assuming the same price on wheat tends to prevail at these three markets at any given time, they conclude that in the above example a carload of grain shipped from Sioux City to Omaha would exceed the market price at Omaha by 7.5 cents. It is further concluded that to remain competitive the operator in Omaha would be forced to sell the grain in Chicago where he could move the grain for the transit balance of 25 cents and thereby regain the 7.5 cents lost. Referring to the above example, it is then argued that in moving a car to Kansas City, an Omaha dealer would either have to pay a transit balance of 4 cents (the balance of the Holdrege-Kansas City rate) or pay the 14-cent proportional rate from Omaha to Kansas City and thereby be unable to compete with a shipment from Holdrege to Kansas City. However, while it is true that in drawing grain from Sioux City a dealer at Omaha pays 7.5 cents over the market

price in Omaha, he is not forced to ship that particular car to Chicago to remain competitive (which is not substitution of billing). He could put the Sioux City bill behind the Holdrege grain and recover the 7.5 cents. Moreover, by putting the Holdrege bill behind the Sioux City grain, the Omaha shipper would not have to pay the 14-cent proportional rate from Omaha to Kansas City, but only 4 cents, which amount is competitive with the rate from Holdrege to Kansas City direct, and thereby reduce his total charges 17.5 cents which would result in reduced revenues of the defendants. Thus, although a dealer at one primary market in drawing grain from the second would be required to pay more than the market price where he is located (by the amount the proportional rate exceeds the difference in price at the two markets), he could recover the amount lost through the substitution of billing and greatly reduce his total charges. While in the usual course of business a dealer would not always have the necessary bills to effect such substitution as shown in the hypothetical case above, this limitation would be offset to some extent by the bills made available to a dealer as the result of grain disposed of locally at a primary market or shipped from the primary market by barge.

If the proportional rates from the primary markets were defeated, it is shown that shipments moving from west to east, transited at the interior points, would still be subject to the proportional rates. Although transit operators at those points can also substitute freight bills, the effect would be greatly restricted due to the limited number of bills available and the transit regulations requiring the same carrier inbound and outbound. In addition, if transit were granted at the primary markets as requested, the transportation charge out of a market to a particular destination would vary depending upon the inbound billing available to support the outbound shipment. As the grain dealer would not be certain of such costs he would tend to protect himself through the amount he would be willing to pay the producer for the grain. Moreover, the evidence indicates that with transit under through rates certain favored bills would be of additional value.

The relief sought would also affect the futures market to some extent. In order to protect himself from price fluctuations while grain is stored, processed, or milled, a dealer, processor, or miller who buys cash grain will sell an equivalent amount on

the futures market.[20] When the cash wheat or products thereof are sold, that person then buys a futures contract in the same amount and type of grain as sold under the futures contract and thus fulfills his obligation. The buyer under the futures contract is entitled to receive with delivery of the grain a live freight bill, but is not entitled to specify the origin on the bill he is to receive. If transit balances were available, he could not require bills producing the lower balances and thus the value of the futures contract would be reduced, which in turn would reduce cash prices which are directly related.

The numerous interveners appearing generally in support of the defendants were concerned primarily with the adverse effect granting of the requested relief would have on the grain interests located at interior points, who would still be subject to the rate-break combinations on the majority of the traffic.

The situation at Minneapolis differs in certain respects from that at the Missouri River markets. Like the Missouri River markets, the growth of the storage facilities at Minneapolis has not been as great, percentagewise, as that at various interior competing points. However, the elevator capacity at Minneapolis far exceeds the storage at the interior transit points in the Northwest. A comparison of these facilities at Minneapolis and St. Paul, Minn., in 1935 with 1959 shows that there was an increase from over 92 million bushels to approximately 123 million bushels. A similar comparison with the elevator capacity of 17 interior transit points in Minnesota, North Dokata, and South Dakota shows an increase during the same period from approximately 3,600,000 bushels to 32,844,000 bushels. Thus, while Minneapolis elevator capacity increased approximately 34 percent, the 17 interior points increased approximately 810 percent. The total elevator capacity in the three-State area, excluding Minneapolis, increased from approximately 93,845,000 bushels to over 263,083,000 bushels or approximately 180 percent.

Unlike the Missouri River markets, there is no major milling industry in the area between Minneapolis and the producing territory located west thereof. Many of the competing interior mills are located in southern Minnesota between Minneapolis and the eastern gateways. Transit operators at these southern Minnesota points can draw grain from the Missouri River markets for the

[20] Futures trading is based upon a standardized form of contract to deliver or receive a specified quantity of a particular kind or grade of grain during a specified time in the future at a specific price.

milling into flour and reshipment to various gateways on one-factor through rates lower than the combinations applicable on shipments transited at Minneapolis. These interior points can also draw grain from the northwest competitively with Minneapolis. The importance of this situation is evidenced by the fact that there has been a major change in the marketing conditions of flour since 1935; namely, the preblending of flours made from spring and winter wheat by the mills. Traditionally, this was done by the individual bakers at the destination, but in recent years the mills have been required to do it. The spring wheats are produced largely in North Dakota, eastern Montana, northern South Dakota, and western Minnesota and are available at Minneapolis at competitive rates. However, the winter wheats produced in Kansas, Nebraska, Colorado, and southern South Dakota are most usually obtained from Omaha and Sioux City, from which points Minneapolis is at a rate disadvantage in comparison with the mills at interior points in the Northwest. The number of flour mills in Minneapolis fell from 15 with an aggregate daily milling capacity of 96,548 hundredweight in 1935, to 7 mills having an aggregate daily milling capacity of 48,300 hundredweight in 1959, and this decline in capacity has been matched by a decline in production. The production of flour in the United States increased from approximately 189,600,000 hundredweight in 1935 to 248,494,000 hundredweight in 1959, whereas production in Minneapolis fell from 13,007,000 to 11,219,000 hundredweight. The Minneapolis production now reflects a decline from 6.9 to 4.5 percent of the total production, whereas production in the interior Northwest increased from 9.2 to 10.7 percent of the total. Minneapolis' share of the Northwest production fell from 42.7 to 30.0 percent during this time. Production of flour in Minneapolis has declined steadily since 1952.

Numerous interveners, including millers and shippers located at the various primary markets, appearing in support of the complainants, also testified that the present rates prevented them from meeting competion from the interior transit points. The Sioux City Grain Exchange requested that if relief be granted to the complainants herein that similar relief be granted Sioux City.

General discussion and findings.—The rate-break plan enables the various primary and interior markets to draw grain from their respective producing areas and reship it to consuming areas competitively with grain moving from other points. It further serves, to the extent possible, to equalize the through rates by

way of these competing markets. As indicated in the first and second *Grain* cases and by the Supreme Court in *Board of Trade*, the absolute rate-break rule was promulgated with full recognition that it would have to meet the test of experience, a test period which, to date, has extended over 30 years. As further indicated in *Grain Case Modifications, supra*, no one objected seriously to a system of rate breaks at the primary markets and overhead rates with transit at the interior transit points. On the contrary, the system was supported by most of those concerned, including the primary markets. That the absolute rate-break rule has been subjected to serious scrutiny on numerous occasions is well established.

On the vast majority of traffic moving from producing areas in the west to consuming areas in the east and south, it is clear that the rate-break combinations afford a satisfactory marketing method both to the primary and interior points as well as to the various grain trade interests. However, on a small but important segment of the traffic, the rate-break combinations applicable on shipments transited at the primary markets exceed the rates on similar shipments transited at various interior transit points. In attacking these differentials, the complainants have sought to emphasize the various changes in transportation conditions that have occurred since the prescription of the absolute rate-break rule, particularly the growth of elevator storage capacity at the interior markets and changes in the production and distribution of flour.

In evaluating the rate situations set forth in appendix B, we consider first the Minnesota aspects. We note the important change in the marketing of flour resulting from the blending of flour milled from spring and winter wheat by the millers. While Minneapolis millers contend that they are disadvantaged in drawing winter wheat from or through such markets as Omaha in competition with interior mills, particularly those in southern Minnesota, and while, in general, the number of flour mills and production at the primary markets, particularly Minneapolis, has declined, this decline results primarily from the development of more efficient techniques in the milling process and the location of mills closer to the consuming areas. Moreover, the evidence shows that millers in Minneapolis can procure the necessary winter wheats from Montana at competitive rates. There is no convincing evidence in support of the contention that the demand for Montana wheat in the West makes it impossible for Minneapolis millers to acquire it at competitive prices.

Essentially, the Minneapolis interests seek to transit on the Omaha proportional rates to the East, as well as on the Duluth rates. However, none of the interior points competing with Minneapolis can transit grain in this way. Certain points in southern Minnesota transit on the Omaha proportionals, but only one such point has storage facilities and that storage capacity is less than 2 1/2 million bushels as contrasted with Minneapolis-Duluth storage capacity in 1959 of nearly 180 million bushels. In addition, the Minneapolis price is generally higher than Omaha for the same grade wheat. If transit, as requested, were granted Minneapolis, and if the price spread were sufficient, one could obtain Omaha wheat in Minneapolis cheaper than wheat from the Dakotas and Minnesota. Also, the distances from Omaha to the East are generally more circuitous via Minneapolis than via other points which may transit on the Omaha-East proportionals. Complainants concede this, and reply only that Minneapolis is really interested in shipping out a blend of spring and winter wheats. While they contend that the greater mileage via Minneapolis on winter wheat from Kansas and Nebraska is offset by the lesser mileage on spring wheat from the Dakotas and Minnesota via Minneapolis, that reply is irrelevant since the rate break does not apply on the spring wheat shipments, and, in any event, Minneapolis' use of the Omaha proportional on winter wheat could not be restricted to situations where there was an equal movement of spring wheat through Minneapolis.

Finally, the overall record does not substantiate an assertion of undue prejudice to Minneapolis or Duluth. First, the gains made by the interior markets apparently have not been at the expense of Minneapolis or Duluth even considering the relative storage capacities in 1935 and 1959. One complainant was unable to say to what extent this increase in storage at the interior markets was due to the rate-break rule and Atkinson Milling expressly disavowed any relation between the two. Secondly, although the number of mills at Minneapolis has declined, the decline has been general and is apparently due in the instant case to the growth of Buffalo and lake traffic. In light of the foregoing, we are of the opinion that the rule has not been shown to have resulted in any unlawfulness in its Minnesota application.

Nor do the exceptions to the rule since its prescription justify a different conclusion as to Minnesota or elsewhere. These exceptions have been permitted only in order to overcome certain demonstrated difficulties in connection with the marketing of grain

and upon the determination that such exceptions would not jeopardize the rate-break combinations as the controlling basis of the rate structure. As indicated in the second *Grain* case, *supra*, the rate-break combinations were unduly burdensome and unworkable in movements between Chicago, Peoria, and St. Louis and they were ordered canceled. In granting relief to Minneapolis and allowing transit there on the Duluth to Chicago proportional rate, it was determined that the market conditions at Duluth and Minneapolis were different than those found elsewhere in the western district. In permitting transit in certain instances at Omaha in *St. Joseph Grain Exchange* v. *Alabama, T. & N. R. Co.*, *supra*, the Commission specifically stated that this exception was not to be considered as a precedent in future proceedings. The vacation of the order as to coarse grains was based on the fact that the rail carriers were losing their coarse grain traffic to itinerant motor carriers who were bypassing the usual marketing channels and seriously affecting the markets. Such conditions do not now prevail here to a significant extent. As previously indicated, other modifications of the rate structure have been made, including departures from the rate-break combinations at border points between the western district and the central and southern territories and at river gateways to the south. In granting the modifications, it was concluded that the rate-break combinations were reasonable, but that for competitive reasons adjustments were required.

There is no persuasive evidence on this record that the other primary markets have suffered material injury as a result of the rate-break combinations on wheat and products thereof. It is apparent that the rate-break rule is not shown to be the direct cause of the increase in interior point storage facilities. As noted heretofore, many other factors are shown to be of more significant influence in that growth, particularly the activities of the Commodity Credit Corporation. The policy of an arm of the Government is, of course, entitled to consideration. Here, however, it is carried out without particular regard to grain rates. A somewhat similar policy as to holding for inspection was held not to be controlling in rate proceedings. *Grand Forks Cham. of Com.* v. *Great Northern Ry. Co.*, 321 I.C.C. 356, 363 (1963). We take the same view here. It is also evident that the primary markets have also experienced an increase in storage capacities under the rate-break system. Whether the relatively greater increase in storage capacity and facilities at the interior markets,

assuming *arguendo*, its direct relation to the rule, justifies relief from the absolute rate-break rule must be determined in the light of the effect of such increases on transit at the various markets. We are satisfied that the increase in storage facilities at the interior markets has little or no effect on the inherent difference in the character of the one-factor through rates with transit and the rate-break combinations. The advantages and disadvantages which accrue under the transit balances at the interior points, as compared with those accruing under the proportional rates, have not changed materially over the years.

We have considered the effect of sustaining the allegations made in the complaint. The complainants contend if the requested relief were granted, most of the traffic would continue to move under the rate-break combinations. However, as previously noted, the evidence shows that the fundamental changes sought by the complainants would result in numerous transit balances out of the primary markets, in addition to the proportional rates. Such transit balances would arise in any instance where transit was allowed at a primary market on the gathering rate from a country origin through that market to another primary market; at a primary market on the proportional rate from another such market through the first to another market or gateway; or at a primary market on a through one-factor rate from country origin to destination. The disruptive and unsettling effect of these transit balances, which would in many instances render the proportional rates inapplicable, is readily apparent. However, outbound proportionals form the basis of the rate structure. Experience has shown that the existence of such an extensive dual system of rates from the primary markets might result in the destruction of the grain rate structure; injury to the grain market process; competitive injury to shippers at the interior markets; and revenue losses to the rail carriers. Certain comments are worthy of note in regard to carrier revenue if transit were allowed at the primary markets. As previously indicated, the resulting transit balances would be lower in varying degree than the proportional rates. Through the substitution of bills, a shipper could avail himself of such lower transit balances in numerous instances. Unlike the proportional rates from the primary markets, which reflect the average transportation conditions involved, these lower transit balances do not reflect the actual services rendered by the carriers, or even an average thereof. Moreover, this situation would differ materially from that at the interior points which are

served by a limited number of carriers and which are subject to various transit rules as previously described. In addition, the maintenance of the proportional rates as the basis of charge on shipments transited at the primary markets is also significant in that under the present rate structure the through rates from country origins to the gateways and the consuming destinations are measured in part by such rates as one of the factors of the combination basis of the through charges.

As previously indicated, the order prescribing the absolute rate-break rule on coarse grains was vacated to enable the rail carriers to meet the competition from unregulated motor carriers and to aid the grain trade interests. However, with a few exceptions, the defendants have voluntarily continued to maintain the rate-break combinations on coarse grains. The complainants have not shown any injury resulting from these rates. Moreover, in vacating the above-mentioned order as to coarse grains, we left the carriers free to file any rate or tariff charge with respect to these grains they viewed desirable, while at the same time according the various shippers reasonable and otherwise lawful rates. Under the circumstances, the failure of the defendants to establish transit on coarse grains, as requested herein, does not necessarily establish that the present rates are unreasonable.

In support of their position that the rates are unduly discriminatory, prejudicial, and preferential, the complainants have stressed the fact that the transit services performed by the defendants are substantially the same at the compared markets. In addition, they rely on the fact that in many instances, the distance involved in transiting shipments at the various interior markets, located on an indirect route through a particular primary market, is equal to, and in many instances greater than, the distance through the primary market. However, as indicated by the Supreme Court in *Board of Trade*, while the Interstate Commerce Act prohibits this Commission from establishing a rate structure which would give one transit point an undue or unreasonable preference and subject another to undue or unreasonable prejudice, the law does not compel identity of treatment for like services at different places. See also *Grand Forks Cham. of Com.* v. *Great Northern Ry. Co.*, *supra*. It prohibits only undue or unreasonable discriminations or preferences. The present-day differences in conditions asserted by complainants are not so substantial as to warrant a finding different from that in *Board of Trade*. More specifically, the fact that the distance involved in transiting shipments at

interior points located on an indirect route through a particular primary market may be equal to or exceed that involved in transiting shipments at the latter market does not establish that the rates are unlawful. This is the result of broadening the original exception to the rule to meet carrier competition in the second *Grain* case. Such exceptions merely enable carriers with circuitous routes and interior points located thereon to compete with the carriers with more direct routes and interior points located thereon. Moreover, to judge the lawfulness of the considered rates on distance alone would work hardship not only on the interior markets and the various carriers, but in certain instances on the primary markets themselves. As indicated in the second *Grain* case, transit on one-factor through rates and the rate-break combinations, two essentially different bases of rates, should not be permitted to interfere with each other.

In addition, it is noted that the complainants, while alleging a violation of section 3, are seeking transit under the lower rates. However, where an order is issued to remove a section 3 violation, an alternative is ordinarily afforded. The offender or offenders may abate the violation by raising one rate, lowering the other, or altering both. The situation must be such that the carrier or carriers, if given an option, have an actual alternative. In this connection, a number of witnesses for the complainants admitted that cancellation of transit at interior points would not be in the best interest of the grain trade. It is difficult to see that the primary markets or grain interests located therein would be helped by such action. Certain of the interior points on the indirect routes alleged to be preferred are also transit points on the direct routes and would not lose the transit arrangements in many instances.

On this record, there is no convincing showing that the absolute rate-break rule is an unreasonable regulation, or that the assailed rates are unjust or unreasonably high, unduly discriminatory, or subject the complainants to undue prejudice and disadvantage to the undue preference and advantage of the interior transit points and grain trade interests located thereat.

Under the circumstances, we find that the absolute rate-break rule has not been shown to be an unreasonable regulation; that the assailed rates on grain and grain products, in carloads, required by or resulting from the application of the rule, on shipments transited at the considered primary markets in the western district have not been shown to be unjust, unreasonable, or otherwise unlawful. An appropriate order will be entered.

We have indicated that the allegations of unlawfulness set forth in the complaints have not been substantiated. Nevertheless, we are entrusted with a wide range of discretion and must consider fully every aspect of this most significant proceeding, including the possibility of authorizing any form of relief less than that sought in the complaints. Indeed, the failure on our part to make findings directed to the choice between vastly different remedies with different consequences to the carriers and the public has proven fatal in the past. *Burlington Truck Lines* v. *United States*, 371 U. S. 156 (1962); *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115 (1962). Such duties render it imperative that we consider the possibility of merely vacating the mandatory aspect of the rate-break rule, an alternative sought by the C.&N.W.

Apart from the advantages and disadvantages occurring to the parties hereto under the mandatory rule, which have been fully discussed herein and previously considered by the courts and this Commission on several occasions, certain results, which, by their nature, were unforeseen when the rule was first promulgated as an experiment, are pertinent here. By its very nature, the rule, which requires that the rate-break combinations be the exclusive basis of charges on all shipments through the primary markets, has certain indirect adverse effects on the public. Although the effects are not subject to measurement with absolute certainty, they are, nevertheless, evident. Specifically, the requirement that the rate-break combinations be the exclusive basis of charges has resulted in a structure which, in essence, holds an intramode "umbrella" over the various railroads in that levels of rates are now required without significant regard to carriers' specific costs, a factor we recognize of extreme significance today. In other words, the rule may well have resulted in a higher level of rates because of the equalization of charges over the circuitous routes and the protection of the carriers' revenues. Such a situation tends to discourage fundamental and beneficial developments in ratemaking. Thus, by its very nature, the mandatory rule does not appear to afford the public any advantages resulting from advancements that have been or may be developed in the movement of grain. In essence, the mandatory rule results in a rather static situation within the western district although there has been a continuous development of advancements, including those of a technical nature, and resulting rate reductions, in connection with the movement of grain in other areas.

Another important aspect of the rate-break structure is the automatic grant to the shipper of the right to stop his grain at the rate-break markets on the movements from West to East without penalty by virtue of the application of outbound proportional rates from the markets. A somewhat similar situation obtains under the transit balances at the interior points. Transit of grain is costly. *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.*, 321 I.C.C. 519, 545. We do not imply any condemnation of this right as such. However, although this right has been extremely important and has been a significant factor in grain movements, there is today a marked trend away from that privilege. *Cf. Grain—K.C., Omaha & Related Origins to Lawrenceburg*, 315 I.C.C. 83; *Grain in Multiple-Car Shipments—River Crossings to So.*, 318 I.C.C. 641, reversed and modified on reconsideration, 321 I.C.C. 582 (the other in the latter proceeding has been restrained by court order in *Cincinnati, N. O. & T. P. Ry. Co.* v. *United States*, 220 F. Supp. 46 (S. D. Ohio 1963) and was ultimately annulled and enjoined by the court's decision of May 20, 1964; *Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine*, 319 I.C.C. 344. Plainly, there is a trend to more "bare-bone" pricing. However, the mandatory order precludes such developments both in the situations before us here as well as in instances where unregulated competition would compel such action. As to the latter aspect, the record indicates that such competition, particularly from trucks in connection with the movement of wheat and flour, has not yet taken place to any great extent. Nevertheless, the general growth and continuing threat thereof are so well recognized that we do not believe it appropriate to require continuance of the rule in its absolute form until such diversion takes place. *Cf. Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn. & Nebr.*, 319 I.C.C. 292, 303. We believe the mandatory rule has acted both as a convenient excuse for not considering possible reductions and as a barrier to adjustments as competition may dictate without continuous recourse to this Commission for relief therefrom. Consistent with the standards of section 15a(2), we abjure any intent to stratify competition. Indeed, we would be remiss in our duty if we were consciously to bar the public from the benefits of competition. We recognize that the rule has perpetuated an atmosphere conducive to the general stoppage of grain cars in transit and, in its absolute form, has resulted in an inertia resisting change toward the more efficient utilization of equipment and the most economic form of movement.

Under the circumstances, we believe that the vacation of the mandatory order and the static situation it fosters would be beneficial despite the absence of a showing of unlawfulness in the present situation. At the very least, the carriers will have an opportunity for competitive initiative. We find that, pursuant to our authority under section 16(6) of the act[21] and consistent with the public interest, the rule of ratemaking, and the national transportation policy, the mandatory aspect of the rule should be vacated and set aside in the same manner as the action taken by us with respect to the transportation of coarse grains in the fifth supplemental report in *Grain and Grain Products*, 298 I.C.C. 261. An appropriate order will be entered.

Certain comments are worthy of note in connection with the lifting of this rule. We do not condemn the present rate structure in and of itself; indeed, we have found no showing of unlawfulness in it. Rather, we leave to the carriers, in the exercise of their managerial discretion, the submission of any new proposals they may deem appropriate. It may be that, as with coarse grains, few will be forthcoming. On the other hand, any new proposals will be scrutinized at the suspension level as we indicated in an analogous situation in *Wrought Pipe to the Southwest*, 319 I.C.C. 310, 317. Our present action, however, *does not* alter immediately any rate relationships. It goes without saying that any new proposals would have to meet the requirements of lawfulness under the act. Thus, if joint through rates were filed from gathering point origins to ultimate destinations with restrictive transit and routing provisions, similarly situated shippers would have to be treated equally. See *Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine*, 319 I.C.C. 344, 354. Such proposals, were they to be filed, would not necessarily result in a harmful dual system of rates inasmuch as the fact that rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a lower rate. *Ibid.*

VICE CHAIRMAN WEBB, dissenting:

There is no basis in the record of this proceeding for wholesale vacation of the Docket 17000, Part 7, orders. Furthermore, I do not believe that the Western grain rate structure can be maintained on a voluntary basis. No party to this proceeding, other than the C.&N.W. conditionally,[22] urged vacation of the outstanding orders

[21] *Cf. Increased Freight Rates, 1958*, 302 I.C.C. 665, 673.

[22] The C. & N. W. urged that if the absolute rate-break rule is found to be unlawful, the Commission vacate the outstanding orders in Docket No. 17000, Part 7.

in Docket No. 17000, Part 7. No segment of the grain trade and no carrier had any reason to suppose that any such drastic action was within the scope of this proceeding. There is no evidence of record in this proceeding respecting intermodal competition which would support a finding that the outstanding *Grain* case orders should be vacated. The absolute rate-break rule reflects one but by no means all of the requirements in the *Grain* case orders.

The Commission's report in *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry. Co.*, 321 I.C.C. 519, (the *Southern Governor's* case) found that the record in that proceeding did not support any change in the rate-break structure prescribed in the Docket No. 17000, Part 7, orders. More specifically, the Commission found at page 543 of its report that a "majority of the grain interests in these proceedings are opposed to a change in the rate-break system" and that the "present record does not support any change in the rate structure."

It may be that abolition of the absolute rate-break rule would necessitate vacation of the other requirements of the *Grain* case orders. The Commission may be right in concluding that vacation of the outstanding orders in Docket No. 17000, Part 7, is long overdue. Nevertheless, I do not believe that the Commission should encourage demolition of the Western grain rate structure solely on the basis of speculation which may be sound but which is totally lacking in evidentiary support.

COMMISSIONERS TIERNEY and BROWN did not participate.

APPENDIX A

The following proceedings were heard on a common record. A summation of the considered complaints is set forth below.

No. 33171, Omaha Grain Exchange *v.* Chicago, Burlington & Quincy Railroad Company Et Al. By complaint filed August 10, 1959, the Omaha Grain Exchange alleges that certain combination rates on grain and grain products, in carloads, applicable on shipments transited at Omaha, Nebr., and Council Bluffs, Iowa, are unjust and unreasonable to the extent they exceed the one-factor through rates on similar shipments transited at interior Nebraska points. It is further alleged that the said rates are unduly prejudicial and preferential. The considered rates apply from origins in Colorado, Iowa, Kansas, Nebraska, and Wyoming to the lower Missouri River markets.

No. 33338, Omaha Grain Exchange Et Al *v.* Abilene & Southern Railway Company Et Al. By complaint filed February 3, 1960, Omaha Grain Exchange, Atchison Board of Trade, The St. Joseph Grain Exchange, The Board of Trade of Kansas City, Mo., Bay State Milling Company, and Wolcott & Lincoln, Inc., allege

that certain combination rates on grain and grain products, in carloads, applicable on shipments transited at the Missouri River markets are unjust and unreasonable, unduly discriminatory, and unduly prejudicial and preferential. The absolute rate-break rule is alleged to be an unreasonable regulation. The considered rates apply from certain origins in Colorado, Kansas, Iowa, Missouri, Nebraska, or Texas to Chicago, Ill., Memphis, Tenn., Minneapolis, Minn., Omaha, Nebr., Sioux City, Iowa, St. Louis, Mo., or certain destinations in Arkansas or Missouri. Also under attack are the combination rates from the Missouri River markets or Minneapolis, Minn., to Chicago and Peoria, Ill., Memphis, Tenn., St. Louis, Mo., or to certain destinations in Arkansas, Louisiana, or Texas.

No. 33397, The Pillsbury Company *v.* Abilene & Southern Railway Company Et Al. By complaint filed March 2, 1960, The Pillsbury Company alleges that certain combination rates on grain and grain products, in carloads, applicable on shipments transited at certain Missouri River markets or Minneapolis, Minn., are unjust and unreasonable, unduly discriminatory, and unduly prejudicial and preferential. It is further alleged that the absolute rate-break rule is an unreasonable regulation. The considered rates apply from certain origins in Iowa, Minnesota, North Dakota, and South Dakota to Duluth, Minn., the Missouri River markets, Chicago, Ill., or St. Louis, Mo.; from certain origins in southwestern Iowa and northwestern Missouri to eastern destinations; from Duluth and Minneapolis, Minn., or certain Missouri River markets to Chicago and Peoria, Ill., Memphis, Tenn., St. Louis, Mo., or certain destinations in Arkansas, Louisiana, or Texas, and from Sioux City, Iowa, to Milwaukee, Wis., and from Omaha, Nebr., to Kewaunee, Wis., when destined east of the Illinois-Indiana State line.

No. 33426, Atkinson Milling Company *v.* Chicago & North Western Railway Company Et Al. By complaint filed April 20, 1960, the Archer-Daniels-Midland Company, successor in interest to the Atkinson Milling Company, alleges that certain combination rates on grain and grain products in carloads, applicable on shipments transited at Minneapolis are unduly prejudicial and preferential. The considered rates apply from the Missouri River markets to certain points in Illinois, Michigan, and Wisconsin when destined east of the Illinois-Indiana State line.

No. 33469, Minneapolis Grain Exchange *v.* Atchison, Topeka & Santa Fe Railway Company Et Al. By complaint filed June 10, 1960, as amended, the Minneapolis Grain Exchange alleges that certain combination rates on grain and grain products, in carloads, applicable on shipments transited at Minneapolis are unjust and unreasonable, unduly discriminatory, and unduly prejudicial and preferential. The absolute rate-break rule is alleged to be an unreasonable regulation. The considered rates are similar to those previously described in docket No. 33397.

APPENDIX B

As a result of the prescription in the second *Grain* case, the gathering rates from common points in Colorado, northwestern Kansas, western Nebraska, and

Wyoming to Kansas City and Omaha are equal.[1] However, the combination rates on shipments from common points to either of these primary markets when transited at the other primary market exceed the applicable one-factor through rates on similar shipments to either of these markets when transited at some interior point by 14 cents. For example, the gathering rate applicable on grain from Greeley, Colo., to both Kansas City and Omaha is 53.5 cents. On shipments to Kansas City, transited at such interior Nebraska points as Fremont or Lincoln, the applicable one-factor through rate is 53.5 cents. On similar shipments to Kansas City, transited at Omaha, the applicable combination is 67.5 cents (53.5 cents plus the proportional rate of 14 cents). Conversely, on grain shipments from these common points to Omaha which are transited at Kansas City, the applicable combination rate would exceed the one-factor through rates applicable at interior transit points by 14 cents. For example, from Eads, Colo., to both Kansas City and Omaha the gathering rate is 51 cents. On shipments to Omaha, transited at Lincoln or at Hutchinson, Salina, Topeka, or Wichita, Kans., the applicable one-factor through rate is 51 cents. On similar shipments to Omaha, transited at Kansas City, the applicable combination is 65 cents (51 cents plus the proportional rate of 14 cents). The above examples are representative of all situations wherein the gathering rates are the same to the primary markets.

Also under attack herein are the combination rates from various Nebraska origins to certain destinations on shipments transited at the primary markets. As previously indicated, the rates from these origins to the eastern gateways of Chicago and St. Louis are dominated by the Omaha combinations,[2] consisting of a gathering rate to Omaha and a proportional rate of 32.5 cents to Chicago or 29 cents to St. Louis. Shipments from these Nebraska origins to the gateways would move under these combinations whether transited at Omaha or some interior Nebraska point. However, the combination rates from various Nebraska origins to Kansas City, applicable on shipments transited at Omaha, exceed those rates applicable on similar shipments transited at interior Nebraska points.

The gathering rates from Nebraska origins north of the Platte River to Kansas City are the Omaha combinations. For example, from Shelton, Nebr., to Kansas City the one-factor through rate is 44 cents as is the Omaha combination (30 cents to Omaha and 14 cents beyond). Thus, whether transit is taken at Omaha or at an interior Nebraska point the charges would be the same. However, from origins south of the Platte River the situation is different. Although the gathering rates to Omaha are 4 cents less than the gathering rates to Kansas City, the Omaha combinations are 10 cents higher than the latter rate. For example, the gathering rate from Harvard, Nebr., to Omaha is 29 cents as compared with 33 cents to Kansas City. But the Omaha combination to Kansas City is 43 cents (29 cents to Omaha plus 14 cents beyond). Thus, the charges on shipments from these origins to Kansas City, transited at Omaha, exceed the

[1] Similarly, the combination rates from these origins over Kansas City and Omaha to Chicago are equal as the proportional rates from these markets to Chicago are both 32.5 cents. However, on movements to St. Louis, the Omaha combination would exceed the Kansas City combination by 4 cents as the proportional rates from Omaha and Kansas City to St. Louis are 29 and 25 cents, respectively. Shipments from these origins to Chicago transited at interior transit points would be subject to these combinations.

[2] From certain areas in northern Nebraska the governing rates to Chicago are the Sioux City, Iowa, combinations.

charges on similar shipments transited at interior Nebraska points by 10 cents. In between the full combination territory over Omaha to Kansas City and the South Platte territory there is a graded territory in which the gathering rates to Kansas City range up to 14 cents higher than those to Omaha. As a result of the above, the combination rates from these Nebraska origins to Kansas City, applicable on shipments transited at Omaha, exceed the one-factor through rates on shipments transited at interior Nebraska points by as much as 14 cents. Representative examples of the various rate situations are set forth in table I below.

TABLE I

Nebraska origins	Interior transit[1] station	Rate to Omaha	Via interior transit station	Rate to Kansas City	
				Via Omaha	Difference
Oshkosh	L-F	45.5	59.5	59.5	0
Osceola	L	24	37	38	1
York	L-N.C.	24	33.5	38	4.5
Aurora	L-N.C.	26	35	40	5
Hastings	L-N.C.	29	33	43	10
Holdrege	L-N.C.	33.5	37.5	47.5	10
McCook	L-N.C.	39	43	53	10
Sidney	L-N.C.	53.5	53.5	67.5	14

[1]F-Fremont, Nebr., L-Lincoln, Nebr., N. C.-Nebraska City, Nebr.

The combination rates on shipments from Nebraska origins to the eastern gateways of Chicago and St. Louis, applicable on shipments transited at Kansas City, consist of gathering rates to Kansas City plus a proportional rate of 32.5 cents to Chicago or 29 cents to St. Louis. These combinations range up to 14 cents higher than the through rates applicable on shipments transited at interior points, which are based on the Omaha combinations. In certain instances the Kansas City combinations are equal to the through rates. From those Nebraska origins from which the gathering rates to Kansas City and Omaha are the same, the combinations over Kansas City to Chicago equal the rates applicable on shipments transited at interior competing points as the proportional rate from both of these two primary markets to Chicago is 32.5 cents. From origins north of the Platte River where the gathering rates to Kansas City is the Omaha combination, the combination rates over Kansas City to Chicago are 14 cents higher than the rates applicable on similar shipments transited at interior points based on the Omaha combinations. From the South Platte and buffer territories the Kansas City combinations to Chicago exceed the rates applicable to that destination on shipments transited at interior points by the amount the gathering rates to Kansas City exceed those to Omaha.

From origins in the South Platte territory to St. Louis, the Kansas City combinations are the same as the rates applicable on shipments transited at interior transit points, based on the Omaha combination, as the proportional rate from Kansas City to St. Louis is 4 cents less than the proportional rate from Omaha.[3] However, there are certain origins from which the Kansas City combinations exceed the rates applicable on shipments transited at interior

[3]As a result of the decision in *St. Joseph Grain Exchange* v. *Alabama, T. & N. R. Co., supra*, there is an equalization of the rates from various Nebraska origins through St. Louis to the southeast.

points. For example, from Plattsmouth, Nebr., to St. Louis, the direct distance over the lines of the Missouri Pacific is approximately 459 miles.[4] On shipments transited at such interior points as Lincoln and Topeka involving movements of approximately 555 and 714 miles, respectively, the applicable rate is 49.5 cents, the Omaha combination. However, on similar shipments transited at Kansas City, approximately 459 miles, the applicable combination rate is 57.5 cents. Similarly, on shipments from the same origin to Chicago, approximately 715 miles, the applicable rate on shipments transited at Lincoln and Topeka, involving movements of approximately 837 and 996 miles, respectively, the applicable rate is 53 cents, whereas on shipments transited at Kansas City the applicable combination rate is 65 cents, although the distance involved in the latter movement is approximately 741 miles.

The gathering rates from origins in Minnesota and South Dakota to Minneapolis are lower than the rates to the Missouri River markets. In certain instances, the gathering rates to Minneapolis are also lower than those to Sioux City, although in other instances, they are equal to or higher than the rates to the latter market. However, the combination rates from origins in southwestern Minnesota and southeastern South Dakota to Sioux City and the Missouri River markets on shipments transited at Minneapolis exceed the rates on similar shipments transited at interior points. This situation is similar to that previously described concerning the Missouri River markets. The same situation exists on movements from origins in these areas to the eastern gateways. For example, from Yankton, S. Dak., to Chicago the standard through rate on shipments transited at interior points such as Cedar Rapids, Iowa, 951.5 miles, is 53.5 cents.[5] On similar shipments transited at Minneapolis, 832.5 miles, the combination rate is 66.5 cents.[6] The combination rates from various origins in Minnesota, North Dakota, and South Dakota to Duluth, applicable on shipments transited at Minneapolis, also exceed the through rates applicable on shipments transited at various interior transit points.

Also under attack herein are the combination rates from various Iowa origins to a primary market or gateway when transited at a second primary market as well as similar rates from origins in Missouri to St. Louis. Representative examples of the rates from Iowa origins to Kansas City are set forth in table II below.

TABLE II

From Iowa origins—	Distance (miles)			Rates	
	Direct	Via Nebraska City, Nebr.	Via Omaha, Nebr.	Via Nebraska City, Nebr.	Via Omaha, Nebr.
Albia	236	344	384	35	47
Osceola	199	288	328	33	42.5
Des Moines	234	323	363	37	43
Creston	166	255	295	32	39
Red Oak	180	206	245	32	32.5

[4]This is route of movement mileage, not short line mileage.

[5]On coarse grains the rate is 44.5 cents. These rates would also apply on shipments inspected or reconsigned at Minneapolis.

[6]On coarse grains the rate is 57.5 cents.

As indicated above, the Omaha combinations exceed the one-factor through rates on shipments transited at Nebraska City in each instance. However, it is noted that other interior Nebraska points such as Fremont do not have transit from Iowa origins to Kansas City. Moreover, as indicated above, the distance through Omaha is greater than that through Nebraska City. The Omaha Grain Exchange stresses the fact that the degree of circuity on such movements through Omaha is considerably less than the recognized circuity limitations. It further points out that from many origins from which the gathering rates to Kansas City and Omaha are equal, the distance to the former primary market exceeds that to the latter. However, there are instances where the reverse would be true.

Representative examples of the rates from Iowa and Missouri origins to St. Louis are set forth in table III below.

TABLE III

Via transit point—	Short tariff distance[1]	Rates
From Red Oak, Iowa, to St. Louis, Mo.		
Direct	415.7	45.5
Atchison, Kans	464.7	57
Leavenworth, Kans	463.9	57
Kansas City, Mo	456.7	57
St. Joseph, Mo	449.2	57
Omaha, Nebr	506.7	57
Nebraska City, Nebr	475.2	45.5
Des Moines, Iowa	492.1	45.5
From Maryville, Mo., to St. Louis, Mo.		
Direct	367.6	42
Atchison, Kans	383.1	50
Leavenworth, Kans	382.3	50
Kansas City, Mo	375.1	50
St. Joseph, Mo	367.6	50
Des Moines, Iowa	501.8	42

[1]Route of the C.B.&Q.

As indicated in the above table, although the combination rates applicable on shipments transited at the primary markets exceed the rates applicable on similar shipments transited at interior points, the distance through the markets is generally shorter than that through the interior points.

The combination rates from origins in Iowa to the eastern gateways applicable on shipments transited at Minneapolis also exceed the through rate. For example, the through rates from Hinton, Iowa, to Chicago and St. Louis are 44.5 and 48.5 cents, respectively. These rates apply on shipments transited at various interior points as well as on shipments inspected at Minneapolis. However, on similar shipments transited at Minneapolis, the combination rates are 57.5 and 70.0 cents, respectively.

The gathering rates from Colorado common points and certain origins in northwestern Kansas to Kansas City and Omaha are equal. However, in moving eastward from the Colorado common points into eastern Colorado and parts of western Kansas, the gathering rates to Kansas City drop in relationship

to those to Omaha to reflect shorter distances to Kansas City. This difference continues until the gathering rates to Kansas City become lower than the gathering rates to Omaha by the amount of the Kansas City-Omaha proportional rate (14 cents). In these latter instances where the gathering rates to Omaha are the Kansas City combinations, the charge would be the same on shipments to Omaha whether transited at Kansas City or at some interior transit Kansas point. The gathering rates from a large area of Missouri to Omaha are also the Kansas City combinations. Although the gathering rates from origins in eastern Colorado and Kansas, west of the Kansas City combination territory, are lower to Kansas City than to Omaha, the Kansas City combinations exceed the one-factor through rates to Omaha applicable at competing transit points by as much as 14 cents.[7] From these areas, the rates to Sioux City and Minneapolis and the Omaha combinations, and shipments to these primary markets transited at Kansas City would also be subject to higher rates than those transited at interior transit points.

The applicable rates on shipments from Kansas origins to various destinations in Missouri located between Kansas City and St. Louis when transited at Kansas City are the Kansas City combinations to St. Louis. The proportional rate from Kansas City to St. Louis is held to destinations west of St. Louis as far as Jefferson City, Mo. However, similar shipments transited at interior transit points move under one-factor through rates[8] which are lower than the Kansas City combinations. For example, the one-factor through rate from Hutchinson, Kans., to Eldon, Mo., is 54 cents. This rate would apply on shipments transited at Topeka and Wichita, Kans. However, on similar shipments transited at Kansas City the combination rate is 60 cents. In many instances, depending on the particular railroad involved, the distance through Kansas City is less than through the interior transit points.

In the second *Grain* case, the rates prescribed from origins in Texas, generally west of Fort Worth, Tex., to Chicago and St. Louis were the Kansas City combinations. As a result, the Kansas City combination applies from origins located generally on and north of the lines of The Texas and Pacific Railway Company. However, shipments from origins south of that line transited at Kansas City are subject to penalties up to 19 cents. For example, from Red River, Tex., to St. Louis, the rate applicable on shipments transited at various interior points is 71 cents. However, on shipments transited at Kansas City, the applicable combination rate is 90 cents.

The rates from these various grain producing areas to the south and southwest are dominated by the Kansas City and St. Louis combinations. In many instances there is an equalization of rates over these markets. From Colorado, Nebraska, part of Kansas, and Wyoming, the normal rates on grain to Arkansas,

[7] Those situations are somewhat similar to those previously described concerning movements from the South Platte territory.

[8] These one-factor through rates apply on movements to Missouri destinations located on and south of the lines of the C.R.I.P., Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company running between Kansas City and St. Louis. However, on movements to destinations south of the line of the C.R.I.P. these one-factor through rates also apply on shipments transited at Kansas City. There are, however, combination rates applicable on shipments transited at Kansas City to certain destinations south of St. Louis and others in southeastern Missouri.

Louisiana, and Memphis, Tenn., are based on the Kansas City combinations. This is also generally true of rates to Texas groups 1, 2, and 3 with the exception of rates from origins in the southeastern corner of Colorado. From Kansas to Texas, the Kansas City combination territory is more limited than on traffic to Arkansas and Louisiana. As a result of this adjustment, transit operators in Kansas City can transit on this traffic at the lowest applicable rate even though the distances through Kansas City exceed the short line distances. However, the rates from origins in such States as Iowa, Minnesota, and South Dakota to the above-mentioned destination groups applicable on shipments transited at various interior points, which rates are based on the St. Louis combinations, are lower than those applicable at the primary markets. For example, from Cedar Rapids, Iowa, to Little Rock, Ark., the distance through the lower Missouri River markets ranges from approximately 1,102 to 1,145 miles, depending upon the particular market. The combination rate applicable on shipments transited at these markets is 77.5 cents. However, on similar shipments transited at the interior markets,[9] involving distances up to approximately 1,535 miles, as in the case of Hutchinson, the applicable rate is 70 cents. From Minneapolis to New Orleans, La., the proportional rate is 88.5 cents, which is the same as the St. Louis combination. This rate applies on shipments transited at various interior markets on routes through the lower Missouri River markets, whereas on shipments transited at the latter markets, the combination rate is 103.5 cents. In many instances the movement through the interior transit point involves considerable out-of-line hauls. For example, the distance through Salina is 330 miles greater than the distance through Kansas City.

Also under attack herein are the combination rates from a primary market to a second market or gateway applicable on shipments transited at a third primary market. In all instances, these combination rates exceed the one-factor through rates applicable on shipments from the same origin to the same destination transited at an interior competing point.

For example, the proportional rate to Chicago is 32.5 cents from both Kansas City and Omaha. The proportional rate between Kansas City and Omaha is 14 cents. Under the absolute rate-break rule, dealers at these markets must pay a combination rate of 46.5 cents (14 plus 32.5 cents), when drawing grain from the other market for transit and reshipment to Chicago. The proportional rate applies over numerous direct routes from these markets to Chicago as well as numerous indirect routes[10] from each of these markets through the other to Chicago. Transit is permitted on the 32.5-cent rate at all interior points on the direct route and at all interior competing points on either side of Kansas City and Omaha, on the indirect routes through these points, but is denied to the latter points. In many instances, the distance through the interior transit point exceeds that through the primary market. For example, the shortest route from Omaha to Chicago is that of the C.B.&Q., through Mendota, Ill., 475.3 miles. The charge on shipments transited at interior points on this route is 32.5 cents. The rate also applies over the route of the C.R.I.P. through Jansen, Nebr., Horton and Topeka, Kans., and Kansas City, 848.4 miles. On shipments transited at Lincoln and Topeka,

[9] Transit points included are Des Moines, Iowa, Hutchinson, Topeka, Salina, and Wichita, Kans., and Enid, Okla.

[10] The routes may be that of a single carrier or it may be a joint-line route.

848.4 miles, or Des Moines, 935.1 miles, the rate is 32.5 cents, whereas the combination rate on shipments transited at Kansas City is 14 cents higher. The above rates are representative of the rate situations pertaining to each of the Missouri River markets in drawing grain from the other for transit and reshipment to the eastern gateways. This situation also exists on those primary markets when drawing grain from Minneapolis for transit and reshipment to St. Louis and Memphis.

Transit is permitted at Minneapolis on the Duluth-Chicago proportional rate on both wheat and coarse grains. However, shipments from Duluth transited at Minneapolis for reshipment to St. Louis are subject to a combination rate of 50.5 cents (11 plus 39.5 cents). As in the case of the Missouri River markets, the Duluth-Chicago proportional rate is applicable at numerous interior points on the indirect routes through Minneapolis.

The combination rates on grain shipments drawn from Omaha and Sioux City milled into flour at Minneapolis for reshipment to destinations east of the Illinois-Indiana State line by way of various Lake Michigan gateways also exceed the one-factor through rates on shipments transited at interior points. Representative examples of these rates are set forth in table IV below.

TABLE IV

From Omaha, Nebr., to—	Transit point	(1)	(2)	(3)	Rate
		Miles	*Miles*	*Miles*	*Cents*
Manitowac, Wis	Mankato, Minn	704.8	-------	------	32.5
Do	Minneapolis, Minn	705.6	-------	------	52.0
Milwaukee, Wis	Mankato, Minn	644.4	-------	814.0	32.5
Do	Minneapolis, Minn	681.7	-------	796.5	52.0
Keewaunee, Wis	Mankato, Minn	-------	829.2	------	32.5
Do	Minneapolis, Minn	-------	782.6	------	52.0
Chicago, Ill	Mankato, Minn	704.5	838.2	871.6	32.5
Do	Minneapolis, Minn	764.1	791.6	880.6	52.0
Do	Winona, Minn	704.5	788.4	792.9	32.5

[1] C&NW routes.

[2] CGW-GBW-KGBW and CGW routes

[3] C.M. St. P.&P. routes.

As indicated above, the combination rates over Minneapolis exceed the through one-factor rates in each instance although the distance may be less through Minneapolis in certain instances. The same situation exists in movements from Sioux City points on the indirect routes through Minneapolis.

APPENDIX C

Storage capacities and receipts at the various markets

In thousands of bushels

	Capacity		Increase (col. 2 minus col. 1)	C.C.C. inventory		Free grain, (col. 2 minus col. 4)	Receipts,[1] 1959	Ratio receipts to capacity
	1935	1959		Amount	Percent of increase			
Atchison, Kans	NA[2]	24,080,000	NA	12,454,000	NA	NA	NA	NA
Des Moines, Iowa	1,325,000	11,029,000	9,704,000	NA	NA	NA	NA	NA
Duluth & Superior, Minn.	50,875,000	68,650,000	17,775,000	NA	NA	NA	170,463,000	248
Enid, Okla	8,300,000	68,312,000	60,012,000	34,523,000	58	33,789,000	55,750,000	82
Hutchinson, Kans	9,150,000	44,633,000	35,483,000	25,310,000	71	19,323,000	63,452,000	142
Kansas City, Mo	60,032,000	101,570,000	41,538,000	46,742,000	113	54,828,000	152,436,000	150
Leavenworth, Kans	NA	1,000,000	NA	NA	NA	NA	NA	NA
Lincoln, Nebr	562,000	33,558,000	32,996,000	23,276,000	71	10,282,000	NA	NA
Minneapolis, Minn	91,685,000	123,029,000	123,029,000	49,471,000	40	73,558,000	284,650,000	231
Omaha, Nebr	26,485,000	35,385,000	8,900,000	16,159,000	182	19,226,000	74,557,000	210
Salina, Kans	5,000,000	46,640,000	41,640,000	37,666,000	90	8,974,000	38,011,000	81
St. Joseph, Mo	10,352,000	25,985,000	15,633,000	10,070,000	64	15,915,000	31,069,000	120
Sioux City, Iowa	3,000,000	12,355,000	9,355,000	4,645,000	50	7,710,000	19,294,000	156
Topeka, Kans	1,650,000	60,245,000	58,595,000	32,565,000	56	27,680,000	31,045,000	52
Wichita, Kans	12,292,000	88,054,000	75,762,000	57,384,000	76	30,670,000	65,405,000	74

[1] Annual average for 1959.

[2] NA – not applicable.

Sources: Exhibit 10, 15, 90-2, and 98.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of June A. D. 1964.

No. 33171

OMAHA GRAIN EXCHANGE

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL

No. 33338

OMAHA GRAIN EXCHANGE ET AL

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL

No. 33397

THE PILLSBURY COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL

No. 33426

ATKINSON MILLING COMPANY

v.

CHICAGO & NORTH WESTERN RAILWAY COMPANY ET AL

No. 33469

MINNEAPOLIS GRAIN EXCHANGE

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL

No. 17000

RATE STRUCTURE INVESTIGATION, PART VII, GRAIN AND GRAIN PRODUCTS, WITHIN THE WESTERN DISTRICT AND FOR EXPORT

The proceedings in Nos. 33171, 33338, 33397, 33426, and 33469 being at issue upon complaints on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, and which report reflects good cause for the action hereinafter taken in No. 17000, Part VII:

It is ordered, That the compliants in the aforementioned proceedings be, and they are hereby, dismissed;

It is further ordered, That the proceeding in Docket No. 17000, Rate Structure Investigation, Part VII, Grain and Grain Products, Within the Western District and for Export, 205 I.C.C. 301 and 215 I.C.C. 83, be, and it is hereby, reopened for reconsideration, and that the orders entered therein, on October 22, 1934, and March 4, 1936, respectively, be, and they are hereby, modified so as to be vacated and set aside to the extent that they require observance of rate-break combinations and of proportional rates therein prescribed as the exclusive basis of charges on shipments of grain and grain products at points from which proportional rates are applicable.

By the Commission.

HAROLD D. McCOY,

(SEAL) Secretary.

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Appendix D

INTERSTATE COMMERCE COMMISSION

Served March 6, 1962

No. 33171[1]

OMAHA GRAIN EXCHANGE

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

Decided .....

Application of the absolute rate break rule at Minneapolis, Minn., Kansas City, Omaha and St. Joseph, Mo., Atchison, Leavenworth and Kansas City, Kans., found in situations of record to be unjust and unreasonable and unduly prejudicial. Unlawfulness ordered removed.

REPORT AND ORDER
RECOMMENDED BY JOHN F. WRIGHT,
HEARING EXAMINER

The issues in these proceedings arise by virtue of five

[1] This report and order also embraces Docket No. 33338, Omaha Grain Exchange, et al. v. Abilene & Southern Railway Company, et al.; Docket No. 33397, The Pillsbury Company v. Abilene & Southern Railway Company, et al.; Docket No. 33426, Atchison Milling Company v. Chicago & North Western Railway Company, et al., and Docket No. 33469, Minneapolis Grain Exchange v. The Atchison, Topeka & Santa Fe Railway Company, et al.

complaints duly filed at various times in 1960. All of the complaints challenge the legality of charges on grain and grain products caused by the absolute rate-break rule with respect to certain of its applications at Minneapolis, Minn., and the lower Missouri River markets of Kansas City, Omaha and St. Joseph, Mo., and Kansas City, Atchison and Leavenworth, Kans. While one of the complaints attacks the lawfulness of the rule *per se*, the evidence is confined to specific rate situations. Only the lawfulness of these is considered herein. The complainants do not seek any new rates or new routes. Relief is sought only as to existing rates and existing routes.

Although over 40 railroads were named as defendants in one or the other of the complaints only 11 appeared and presented evidence during the course of the various extensive sessions of the oral hearing herein.[2] There is nothing in the record to explain the nonappearance of the other railroad defendants.

All of the complaints set forth rate situations, in which, by reason of the application of the absolute rate-break rule, higher charges are required to be paid which are alleged to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act and unduly preferential of interior points and unduly prejudicial to the primary

[2] The defendants that appeared and presented evidence are as follows: Chicago & North Western Railway Company, The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago, Rock Island and Pacific Railroad Company, Fort Worth and Denver Railway Company, Northern Pacific Railway Company, Union Pacific Railroad Company and Wabash Railroad Company.

markets in violation of section 3 of the act. In addition, the complaint in Docket No. 33338 charges unjust discrimination in violation of section 2 of the act.

The rule under attack is set forth in Item 5(d) of Agent Preuter's tariff I.C.C. A-4260, and reads as follows:

> "From points from which proportional rates are published to the transit destination, no basis lower than such proportional rates will apply under transit."

All of the rate situations complained of are subject to this or a similar rule. The rates involved in each complaint are set forth in Appendices A through E attached hereto. In each instance the outbound charges, when transit is taken at a primary market, are higher than those applicable when transit is taken elsewhere on the routes involved.

The absolute rate-break rule requires that, from points from which proportional rates are published to a transit destination, the basis of charge, when transit is taken at such a point, shall be no lower than the proportional rate. The rule was first promulgated by the Commission in *Grain and Grain Products Within The Western District and For Export,* (The *Western Grain* case), 164 I.C.C. 619 in 1930. At page 645 thereof the Commission stated:

> "We find that the practice of contemporaneously charging both proportional rates and transit balances subjects the shipper under proportional rates to undue prejudice and disadvantage, and gives to the shipper under the lower transit balance an undue preference and advantage, from which the carriers will be required to cease and desist; that the through rates herein prescribed, on the basis of flat rates to the primary markets and proportional rates beyond, will be reasonable; and that overhead through rates less than those combinations should be cancelled."

As a result of a Supreme Court decision the rates prescribed therein were cancelled in 1931. After a retrial, the proceeding was again decided by the Commission in 1934, as reported in 205 I.C.C. 301. The rule was again prescribed and, as its reasons therefor, the Commission said at page 334:

> "The main reasons for the requirement of the exclusive application of the rate-break combinations were that transit balances less than the proportional rates out of the rate-break markets tended to disrupt the rate-break combinations, disorganize the general rate structure, make uncertain in advance the outbound basis of charge, give an undue preference to users of transit balances over the users of proportional rates, depress the price of grain at rate-break markets and, by direct reflection, at the country points, and reduce the revenues of the carriers."

The Commission added at page 335:

> "The advantage to user of the transit balance over the user of the higher proportional rate is evident, and increases in the ratio of the increase in the storage capacity of the respective cash-grain dealers at the rate-break markets. In other words, the greater the storage capacity the wider the selection of inbound billing and proportionately more transit balances."

The Commission made certain exceptions in the interest of carrier competition via lower rated routes. However, these are not relevant here and the exceptions did not permit stopping for transit at the primary markets.

In a supplemental report after further hearing, issued in 1936, 215 I.C.C. 83, the Commission modified its previous ruling so as to permit transit, in the discretion of the carriers, at interior transit points on a route through a rate-break market on the basis of the lower rate in effect over a competing route between the same points. This was done in

order to equalize these points with transit points on the cheaper routes, regardless of whether the interior transit points on the equalized routes be also transit points on the cheaper routes.

The Minneapolis, Kansas City, and Omaha interests sought relief from the application of the rule by filing complaints in what is known as the *Grain Case Modifications,* 223 I.C.C. 235, 229 I.C.C. 9, and 231 I.C.C. 793. Initially therein, the Commission granted temporary relief to the complainants but this was eventually denied. The United States Supreme Court affirmed the orders of the Commission therein in *Board of Trade of Kansas City* v. *United States,* 314 U. S. 534. (1942).

The defendants maintain that the decisions upholding the absolute rate-break rule against the same claims of unreasonableness and unlawful discrimination as are advanced by the complainants here, forbid, at this late date, any conclusion that the difference in treatment of primary markets and interior transit points under the rule is, as a matter of law, a violation of the Interstate Commerce Act.

A review of these decisions, however, reveals that the rule was not promulgated on such an impregnable foundation that it was rendered sacrosanct and eternal. In 1930 in its first decision in the *Western Grain* case, *supra,* the Commission asked the cooperation of all parties to take note of the effect upon their interests of the rule and, to bring to its attention from time to time, those situations which might require further consideration after a reasonable trial period. The Commission also stated therein at page 698:

> "Nothing but experience can demonstrate what the effect will be regarding certain of these issues. * * *"

In its second decision, in 205 I.C.C. 301, 342, the Commission in 1934 declared that the rule should be given a more

comprehensive test than was afforded during the period of the Part 7 adjustment (the *Western Grain* case). Again, in *Grain Case Modifications, supra,* the Commission, in 1937, said at page 245:

> "No extensive rate structure can be made perfect nor can any rate structure be made permanent in any real sense in a changing world."

and at page 246, the following comments:

> "The two grain cases together have demonstrated the impossibility, even on the part of those most experienced, most competent, and most expert, of seeing in advance the consequences of the particular changes in rates and practices here under consideration. Apparently nothing but experience can furnish a demonstration, and even the demonstration of experience may not prove to be conclusive unless it can be had on a scale sufficiently large and at intervals of time sufficiently close, and under substantially similar conditions."

In its report upon reargument therein, 229 I.C.C. 9 (1938) the Commission said at page 15:

> "The rate-break adjustment is entitled to a thorough test over an adequate period of normal conditions in the grain trade. It has received no such fair test up to the present time."

The Supreme Court, in 1942, took into consideration the experimental nature of the rule and the Commission's request for a period of trial thereof in the *Board of Trade* case, *supra.* The Court did this at page 547 of its opinion, in the following language:

> "Weighing the prospective gains and hurts which were part of all the proposed remedies, the Commission decided upon the exclusive rate-break combination. It did so, however, with full recognition that the wisdom of its action had to meet the test of experience. Therefore, it treated its conclusion as part of a continuing

process, and requested the parties to give the system which it adopted 'reasonable trial,' contemplating such further consideration as the practical operation of the system would require. The Commission refused the modifications asked by the appellants because the rate-break adjustment was 'entitled to a thorough test over an adequate period of normal conditions in the grain trade' and it had 'received no such fair chance up to the present time.' "

In view of the experimental nature of the inception of the rule, the plea for a test period, and the ensuing experimental era of some 25 years, the defendants are in error in claiming that the above-quoted decisions forbid, as a matter of law, any holding that the rule constitutes a violation of the act in any of its applications. After a period of trial of more than 25 years, and in the light of the above rulings, the rule must stand or fall on the basis of the evidence of record herein, which evidence consists of the cumulative experience and results of the long period of trial.

From its very conception, the absolute rate-break rule was not made universally applicable. It never applied to export traffic, although wheat in 1958 exported from the United States was 441,806,000 bushels and, in the years 1956 and 1957, the amount of grain exported was approximately one-half that sold from the farms. That statement does not, of course, imply that the wheat moved directly from the farms for export. It simply indicates a part of the volume of grain to which the rule is not applicable.

Within the Western District itself, the rule did not apply from the proportional rate points of Chicago, Peoria, St. Louis and Milwaukee to destinations in Official Territory. It was applicable to westward movements from those points, but the historical flow of grain is to the east and south. And it is as to the eastward movement from the complaining primary markets that the defending defendants insist upon the continuance of the rule.

The Commission has also modified the application of the rule since its initial prescription and has granted exceptions therefrom. In *Wheat Products from Twin Cities to Chicago,* 218 I.C.C. 27, (1936) transit was permitted at Minneapolis on wheat and wheat products on the intermarket proportionals from Duluth to Chicago. In *Southwestern Millers' League* v. *Atchison, T. & S. F. Ry. Co.,* 227 I.C.C. 795 (1938), 231 I.C.C. 130 (1938), transit was permitted at Kansas City on a basis lower than the rate-break combinations on grain from southern Kansas to Memphis. In its *Fifth Supplemental Report,* in the *Western Grain* case 298 I.C.C. 261 (1956), the Commission vacated the prescription of the rule with respect to coarse grains.[3] In *St. Joseph Grain Exchange* v. *Alabama T. & N. R. Co.,* 291 I.C.C. 588 (1954), transit was authorized at Omaha on some Kansas City combination rates to the South.

Another exception was granted in *Merchants' Exc. of St. Louis* v. *Alton & S. R.,* 299 I.C.C. 167 (1956), on grain and grain products from the Missouri River markets and points based thereon, transited at St. Louis, Mo., and reshipped to points in the south and southwest.

Leaving the legal history and turning to the record, the complainants have introduced extensive evidence to show the changes in conditions which have occurred since the prescription of the absolute rate-break rule and, at least some of the changes, are attributed by them to the existence of the rule itself. Chiefly, they are the changes in the interior grain receipts and storage as compared with the markets; the milling quality of Nebraska wheat, the movement of flour in bulk, and their competitive disadvantages.

[3] Coarse grains include corn, oats, rye, barley, and grain sorghums.

As to Kansas City, its evidence shows that, of the total three States production of Kansas, Nebraska and Colorado, receipts at Kansas City declined from 48.75 percent of that product in 1935, to 23.80 percent in 1959. The following chart shows the production of these States for the years 1935 through 1939, and 1955 through 1959, and the percentage thereof included in the Kansas City receipts by year:

Year	3-State Total Production (000 bushels)	Kansas City Receipts Per Cent of 3-State Total Production
1935	101,947	48.75%
1936	171,652	37.14%
1937	214,143	44.87%
1938	218,858	45.52%
1939	157,721	51.07%
1955	222,590	45.23%
1956	224,130	45.12%
1957	211,440	36.30%
1958	474,339	18.96%
1959	333,253	23.80%

Similarly, the record shows that there has been a decline in wheat receipts at St. Joseph and Omaha. In 1950 their receipts were respectively, 17,354,000, and 33,019,914 bushels. For the year 1959 their receipts were, respectively, 13,187,660, and 20,053,916 bushels.

In contrast, receipts at the competing interior markets of Enid, Okla., Hutchison, Salina, Wichita, and Topeka, Kans., show a marked increase, particularly Topeka, which in 1959 received 279 percent more grain than it did in 1949. The combined percentage of increase at these interior markets 1959 over 1949 was 39.2 percent.

Coincident with the decline of receipts at the lower river markets was the tremendous growth in grain elevator capacities at these interior markets. While, since 1935, Kansas City, Omaha and St. Joseph experienced a growth in such capacities of 69.2, 33.9 and 151.0 percent respectively, the interior markets far outstripped them. Their increase in elevator capacity during this period of trial ranged from 387.8 percent at Enid to 3,540.9 percent at Topeka.

The Minneapolis complainants apparently have not suffered from a decline in receipts such as have the lower river markets. However, like the latter, they point to the contrast in growth of the terminal facilities at their primary markets as compared with interior northwest points, as well as to the decline in flour milling at Minneapolis. Since 1935 the aggregate capacity of terminal elevators at Minneapolis grew from 92 to 123 millions of bushels. Twenty million bushels of new capacity is due to the construction of elevators with waterfront facilities on the Mississippi River. This amounts to a 34 percent increase. In contrast, the total elevator space outside of the primary market in the States of Minnesota, North Dakota and South Dakota experienced increases ranging from 109 to 316 percent.

The increase in capacity is even more unfavorable to the primary market when compared with growth at specific points. For instance, Aberdeen, S. Dak., increased its storage capacity from 112,000 bushels to 2,265,000 bushels, or a 1922.3 percent increase. Breckenridge, Minn., grew from 25,000 to 1,060,000, or a 4140.0 increase. Jamestown, N. Dak., had the greatest percentage of increase 48,000 to 2,940,000, or a 6025.0 percent increase. And Grand Forks, N. Dakota, Mankato, Minn., Minot, and West Fargo, N. Dak., all show a greater percent of increase in storage capacity than Minneapolis.

The defendants attribute the startling growth in the interior storage capacity, which, incidentally, completely reverses the picture from that in 1935 when the main storage capacity was at the primary markets, to the government's commodity credit program. Many shippers testified on behalf of the complainants and interveners in their support. Their testimony, outlined below, clearly shows the effect of the absolute rate-break rule on the growth of interior storage.

The president of a large grain merchandising firm in Kansas City testified that the rule forbidding primary market operators to transit on through rates is a rule prohibiting them from to that extent, engaging in business. His testimony is that it is utterly impossible for the operators at the market to pay the full combination of rates when there is a lower through rate applying through the market on which transit is allowed at competing centers. He further testified, as is conceded in all grain rate proceedings, that even small differences in price, a fraction of a penny, may affect a sale. Also, that differences in freight rates are reflected in the price of grain. He flatly stated that if he did not have available the same transportation charges as his competitors, he simply was not going to do the business. He named, as being among his chief competitors, operators at Topeka, Wichita, Salina, and Hutchinson, Kans., and Enid, Okla., among others. All of these, for instance, can buy grain in Omaha, store it in their own interior facility, and later resell to buyers in the East at no penalty.

St. Joseph commercial witnesses spoke in a similar view. The manager of grain purchasing for the Quaker Oats Company testified that he bought grain for their two plants located there, one a flour mill, and the other, a cereal and feed mill. His testimony is that for the flour mill, grain is bought from an interior point such as Lincoln, Nebr., rather

than from Omaha. Further, that there are times when he would like to buy at Omaha because of the quality and variety, but it is competitively impossible. For the feed mill, however, his company purchases oats at the north of Omaha for shipment to the south and southwest after milling, because of the equalization of rates. Other witnesses testified that there was no movement of grain from Omaha to St. Joseph, except in emergencies.

Twelve commercial witnesses testified on behalf of the Omaha complainants. According to them, their greatest competition comes from the interior Nebraska markets of Lincoln, Grand Island, Fremont, Nebraska City, and other interior terminals west of Omaha. Omaha draws grain from the States of Colorado, Kansas, Nebraska, and Wyoming. Also, it draws from Iowa, Minnesota, Missouri and South Dakota. The interior terminals draw from the same areas. The Omaha witnesses testified that they were, in many respects, noncompetitive with operators at interior points because of the high transportation costs occasioned by the absolute rate-break rule. Further, that due to the interior points greater flexibility, that is, ability to transit on the balance of the through rates, they are in a better position to attract grain than the Omaha market. In order to overcome these disadvantages some of the grain firms located on the Omaha market found it necessary to stop grain at points such as Lincoln, and other interior points, for onward movement to Kansas City. One firm, in order to better compete, found it necessary to construct facilities at the interior points of Lincoln and Fremont in order to have the advantage of transit to Kansas City and beyond. For the same reasons, one found it advantageous to grind preblended flour at its Fremont mills rather than at its Omaha mills.

With respect to flour milling, the number of mills at Minneapolis declined from 15 with a daily milling capacity of 96,548 hundredweight in 1935, to 7 mills having an aggregate daily milling capacity of 48,300 hundredweight in 1959. This decline cannot be attributed entirely to the growth of competition at Buffalo, N. Y., and other lake points, as claimed by the defendants. There has been an increase in flour production at interior northwest points. In 1935, the total U. S. production of flour, in hundredweights, was 189,612. Minneapolis produced 13,007, while interior northwest points produced 17,528 hundredweight. In 1959 total United States production was 248,494 hundredweight. Production at Minneapolis was 11,219, interior northwest points accounted for 26,559 hundredweight. In terms of percentages, in 1935 Minneapolis produced 6.9 percent of the total United States wheat flour, and 4.5 percent in 1959. Interior northwest points in 1935 produced 9.2 percent, and, in 1959, 10.7 percent. In 1935 Minneapolis produced 42.6 percent of the northwest wheat flour and, in 1959, only 30 percent.

Pre-blended flour is an innovation since 1935. Commercial witnesses from Minneapolis delved deeply into the change in marketing conditions due to the demand of large commercial bakers for pre-blended flours. The demand can be met only by having access to as wide as possible a selection of both spring and winter wheat. This, they testified, cannot be done in the face of the discriminatory freight penalties. The importance in this change in the milling of flour can best be brought out by the following testimony of one of the witnesses for the complainants. It covers the history, background, and present-day demands with respect to pre-blended flour. His evidence also explains the problems created for his company by the application of the absolute rate-break rule. His uncontradicted and wholly credible testimony was, in part, as follows:

"For many years we have sold exclusively to bakers and to distributors who sell to bakers.

"Traditionally, bakers know that when they bought flour processed in the Southwest and even as far east as St. Louis and beyond, they would get flour that was made predominantly from Hard Winter Wheat. The flour bought from Minnesota, Dakota and Montana mills would be made predominantly from Spring Wheat. Purchasing from these two major producing areas and blending in the bakeries was the common practice—unless the plant used only Spring or only Hard Winter wheat flour.

"New Flour testing techniques have enabled mills and bakery laboratories to more accurately evaluate the baking characteristics of Spring and Hard Winter wheat flours and set up very strict buying specifications. At the same time the economies of bulk flour storage and handling have in more and more cases made the use of Spring-Winter blends a necessity. Today bakers know what they want and it is up to the mills to blend wheats that will produce the flour that satisfies their needs.

"The wholesale bread baking industry makes up about 75% of our volume and the flour requirements of these customers have changed drastically since 1953 when Atkinson Milling Company made the industry's first delivery of bulk flour to a wholesale bread baker. Today about 43% of our production is shipped in bulk, and this percentage is rapidly rising. As the bakers have switched to bulk, more and more of them are insisting that the mills furnish blends of Spring and Winter flour, and consequently are switching their business to mills who are so located that it is economically sound for them to mill both types and blend before shipment. By buying blended flour, a baker's initial investment in bulk flour storage bins can be reduced by 40 to 50% and problems of blending in his own plant are eliminated. Since this difference in the original cost of a bulk installation can often amount to as much as $30,000

to $60,000, this is a very important factor. Even some of the very few bakers who originally built sufficient bulk storage capacity so that they could continue to buy Spring and Hard Winter wheat flours separately and do their own blending, are now changing to buying preblended flour because they found it difficult to maintain a uniform blend with their own equipment.

"The high degree of mechanization developed in bakeries since the mid-1940's demands flour that is as uniform as possible and in many cases requires baking characteristics that can only be achieved by properly blending the wheats and/or flours from both the Northwest and Southwest. Traditionally, bread and other yeast dough products have been produced by what is known as the batch method—that is, the incorporation of a fixed quantity of each ingredient required. Each batch remains a separate unit from mixing, through fermentation, dividing into load size, proofing, panning, baking, slicing, wrapping, etc. One large batch in the beginning becomes several hundred loaves in the end. Many bakeries process one of these large batches approximately each 15 minutes around the clock on their peak production days. There is relatively little chance for adjustments in mixing and fermentation time or for ingredient changes in view of the speed at which these batches move through a modern plant today.

"During the last few years several continuous processes for bread have been developed. These latest methods permit even less opportunity for adjustments to cope with changing flour characteristics than the batch method. From this, the importance to the baker of flour uniformity is obvious.

"Practically all large baking plants today have rigid specifications for protein, ash, diastatic activity, absorption, farinograph mixing time etc. that must be met. Many of these specification factors enable the baker to estimate the percentage of Spring and Hard Winter in his flour, as well as to ascertain in advance the baking qualities he may expect from it in production.

"All of this background information is presented in order to show the absolute necessity of our having wheats available from the major Southwest Hard Winter wheat territory on a competitive basis with mills located south and east of us. Only if this is promptly achieved will we be able to continue to operate a mill successfully in Minneapolis.

"Bakers' demands for blends, as I have outlined, and the sound reasons for favoring them, have already caused us to lose several customers whom we formerly served regularly. During the last two years this loss has totaled over 200,000 cwt. of flour per year or the equivalent of about 25 days production. That loss is equal to ½ day's production per week throughout the year and could mean the difference between profitable operations and a loss in the highly competitive milling business. Actually we would have lost still more good customers had we not absorbed the freight penalty to get the Hard Winter Wheat needed. It has become a question of losing more volume or retaining part of the business on less or no profit. Had we lost twice as much, it is doubtful that we could have survived, because no mill can last long on a 4 day operating week.

"To some extent we have been able up to now to offset part of these losses by more aggressively seeking out the business of the small retail bakers who still prefer straight Springs, but this is at best a small segment of the total market, and we have no competitive advantage in this type of business over the Southern Minnesota mills who can now also supply the large bakers with blends, * * * *"

A witness for an Atchison mill established that the desirable hard winter wheat so essential to pre-blending and now available at Omaha was not grown in Nebraska at the time the rule was promulgated. It is available to competing mills at Topeka, Lincoln and other points which transit on the Omaha-Chicago proportional. The penalty resulting from the rule prohibits the Atchison mill, like the Minneapolis mills, from purchasing at Omaha.

This testimony is substantially corroborated by other Minneapolis witnesses. Their testimony is to the effect that it is problematical that flour milling will be continued at Minneapolis unless competitively priced hard winter wheat is available to them at competitive prices. Such wheat is available only at Omaha at the present time. The application of the absolute rate-break rule makes the cost of now buying such wheat prohibitive for them.

Thus, it appears the two greatest changes that have occurred since 1935 in the grain industry in the area involved have been the enormous increase in interior storage facilities and the demand of commercial bakers for bulk shipment of pre-blended flours. As shown above, the latter demand has also affected the origins from which millers must now draw wheat. The defendants do not deny, but attempt to minimize, the latter change. The attempt to minimize, however, is made only on brief, there is no evidence of record with respect to pre-blended flour to counter that cited above.

Another matter brought up by the defense is that switching and interchange of grain cars is vastly more complex and time consuming at the large terminal markets than it is at interior points, and the difference justifies the different treatment now accorded the large markets. It is, they say, more costly at the latter. It is undoubtedly true that the larger the terminal the more complicated and costly the switching. But that is a matter that has not affected the prescription of, or voluntary granting of, transit privileges in the past. In any event, such costs cannot be any higher, if as high, at the primary markets we are here concerned with, than at the even larger terminals, Chicago, Ill., and St. Louis, Mo. And the switching is no different than that presently performed by the defendants in connection with transit under the current exceptions to the rate-break rule

at these markets which are mentioned earlier herein. There is, on this matter, no justification for a difference in the treatment of the primary and the interior markets.

Turning now to consideration of the reasons given for the original prescription of the absolute rate-break rule, the first was that transit balances less than the proportional rates tend to disrupt the rate-break combinaions. This may have been so in 1935. At the present time, however, the great number of milling points, markets and processors that have sprung up in the interior, and the inherent competitive nature of the industry, do not allow grain to come to the primary markets, unless freight charges in and out thereof are equalized. Practically all of the commercial witnesses have so testified. Penalties have been incurred, at times, because of an absolute need for a particular type or quality of grain. That penalty is imposed by the rule. If transit were permitted at the markets in such a manner that the rate-break combinations are protected, then they are not disrupted. Further, there is no evidence here of any such disruption following the granting of certain exceptions from the rule at the complaining markets. If the overhead through rate when applicable, is protected, there can be no resulting disorganization of the general rate structure.

No problem is presented regarding the uncertainty of knowing, in advance, the outbound basis of charge. To avoid uncertainty, all the buyer has to know is the origin of the grain. Knowing the rate from the origin, the destination rate is within his knowledge and under his control.

Concern over the effect on futures trading that the relief sought will have if granted, has been expressed by the Commission in the past, and by the defendants now. There is no futures trading at St. Joseph and Omaha, and very

little at Kansas City when compared to Chicago, where the rule is largely inapplicable. This is a concern misplaced. There is no evidence that actual deliveries are made on these contracts. And, in any event, it is the rule of the exchanges that requires delivery, if made, at the proportional rate.

The preponderance of evidence in this record is that the application on the absolute rate-break rule has tendered to depress the price of grain at the primary markets. Originally, the opposite was thought to be true. But the inability of dealers at the primary markets to meet their competition because of the higher transportation charges reduces the number of outlets for grain and therefore lowers the price. The greater the competition the higher the price.

Of prime importance at the time of the rules' prescription, and perhaps more so now, was the conservation of the railroads' revenues. Several witnesses for the defendants testified that, if the relief here sought were granted, the railroads would suffer losses in revenue running into the hundreds of thousands of dollars per year. This testimony, however, was based on the difference between the transit balance that might be collected and the full proportional rate. It was not premised upon any current or past movement of traffic. They admitted they knew of no such movement now. Their estimates were all based on mathematical calculations related to hypothetical movements. Opposed to this is the testimony of the complainants' commercial witnesses that, with very few exceptions which are hardship cases, such as the already described movement from Omaha to Minneapolis for the Atkinson mill, the merchandisers and processors at the primary markets are simply prevented from competing with the interior points because of the difference in transportation costs. There is nothing in this record to show that relief from the absolute rate-

break rule as requested herein would cause any financial loss to the railroads. Conversely, there is no showing in this record of actual revenues received by the defendants as a result of the application of the rule to the complaining markets.

The defendants, on brief, have argued that their transit studies demonstrate that there is a movement, at least of wheat, into Omaha from Sioux City and southern Nebraska, and out of Omaha to Chicago and Kansas City, at the proportional rates. This argument is based in part on the testimony of one of their witnesses who checked the carrier's records as to some 224 carload movements into those markets. However, he did not know whether the cars terminated or unloaded at the primary markets. Nevertheless, the defendants claimed that his testimony is substantiated by another traffic study.

The particular study is a showing of transit volume at the primary markets compared to the volume at the interior points. This study, which was based on the Commission's one percent waybill sample, is in evidence by virtue of an order of the Commission. It had been rejected by the hearing examiner after objection thereto, mainly on the grounds that it constituted hearsay and because, under the applicable law, the Commission's records on which it is based, were not available for examination by the complainants. While the study does show, and it is only natural, that the primary markets have a greater volume of transit, for the reasons hereafter stated it can be given little weight in respect to the issues herein.

There was no showing in connection with the exhibit that the transits at the primary markets indicated therein moved outbound on the full proportional rates. In fact, the sponsor of the exhibit testified he did not know if the outbound movements from the primary markets were on the propor-

tional rates. If they had, the revenue departments of the various defendants could easily have presented competent evidence to that effect. Then there could have been no question as to the facts. The testimony, already alluded to, of the commercial witnesses for the complainants that they are incapable of competing with interior points and that, with minor exceptions, there are no such movements, is wholly credible and must be relied upon, absent any evidence of actual revenues received by the defendants.

Also, there are existing exceptions to the rule. The volume of transit taken under these exceptions was not separated out and were included in the defendants' exhibit. To that extent the exhibit also is no indicator of any possible loss of revenues. There is an admitted possibility that the exhibit may include some export shipments. The rule does not apply to them.

Another matter affecting the weight of the traffic study is its incompleteness. Including the lower river primary markets, there are 1,151 transit points in the 13 States from which these markets draw. Transit at all of them is not included in the exhibit. Similarly, as to Minneapolis, transit in Iowa and Montana, a competitive area, is not shown. Finally, a spot check of the waybill list used in the preparation of the exhibit was made by one witness. His testimony was that if the study had included terminations in Kansas the showing of transit at interior points and at primary markets would have been substantially different.

Reviewing all of the above it is clear that the absolute rate-break rule, at least for the past several years, has had a definite effect and impact on the primary markets. In spite of all of the advantages they presumably had, and which the rule was designed to protect, the markets have declined or have failed to keep pace with the interior

growth. Rail revenues have not been conserved. It thus appears that the rule has failed to produce the desired and intended results during its period of trial. Surely it was not designed to move storage facilities away from the primary markets, but that has happened. Its inflexibility renders it impossible, except with great hardship, for the millers and processors at the primary markets to continue to compete for the constantly growing pre-blended flour business, which was not even in existence at the time of the inception of the rule.

One of the other causes of concern at the time the rule was instituted was substitution of billing. This was said to favor the operator at the transit balance over the user of the proportional rates, particularly at the large storage points. Substitution of billing is lawful and provided for in the tariffs of the carriers. It is now available to, and being used by, the transit operators at the interior points. They, of course, are limited to the inbound carrier for the outbound haul. But the limitation creates no serious problem for them inasmuch as, after their shipments reach the primary market, all routing is open to them. The defendants do not contend that they suffer any loss of revenue through substitution at the interior points. Neither do they argue or show that they are suffering loss of revenue due to substitution because of the exceptions to the absolute rate-break rule, including export movements, now existing at the complaining markets.

Upon reviewing the changes that have occurred and the effects of the absolute rate-break rule upon the complainants during its long period of trial, as outlined herein, none of the once presumed advantages to them appear to have come into existence. The disadvantages to them, which now exist, also were not apparent at the time of the rule's prescription. The promulgation of the rule rested largely upon the Commission's expertise in weighing possible benefits

and injuries. It was on that basis that the Commission was upheld by the Supreme Court in the *Board of Trade* case, *supra*. To continue to inflict the injuries upon the complainants as described herein would be an action directly contrary to the mandate of Congress to the Commission set forth in sections 1, 2 and 3 of the act. On this record there is no room or justification for the exercise of discretion as to the justness and reasonableness or whether there is preference and prejudice to the degree that it become undue. The plain mandate of the act must be executed. Any other course would only perpetuate unforeseen and serious injury to the complainants in devotion to an experiment demonstrated to have failed and to be productive of, rather than preventive of, violations of the Act. The evidence detailed above disposes of the assumptions on which the rule was founded and there is now no warrant for any different treatment of primary and interior markets. The complainants are entitled to the relief they seek.

The basic principles applicable to these situations require no citation of authority. On the evidence here, the granting of transit at points on existing routes while making a greater charge for the same service at another point on the existing routes which happens to be primary market, is unjust and unreasonable, in violation of section 1 of the act. It is also unduly preferential of the interior and unduly prejudicial of the primary markets and merchandisers and processors thereat in violation of section 3. It is unnecessary to pass on the section 2 issue.

The form of the relief recommended will protect the revenues of the carriers. They will, in all instances, receive the full applicable rate, in whatever form it may be, from origin to destination. If that rate is a just and reasonable one, then they receive their full entitlement.

The examiner finds and concludes that, as to the routes included in the complaints and Appendices A through E hereof, and on which transit is permitted at a point or points other than a primary market, the present charges for transportation furnished, when transit is taken at Atchison, Leavenworth, St. Joseph, Kansas City, Omaha, or Minneapolis are unjust and unreasonable and unduly prejudicial to the extent that they exceed the following whichever be applicable:

(1) The lowest applicable through overhead rate from origin to destination, if such there be;

(2) The lowest applicable combination basing on or over the primary market; or

(3) The full through inter-market proportional rate, when transit is taken on that basis, from the origin market to the destination market.

Premises considered, it is the ORDER of the Examiner that the defendants, accordingly as they participate in the transportation, be, and, they are hereby, notified and required to establish rules and tariff provisions which eliminate the unlawfulness herein found, on or before 90 days from the date this recommended order becomes effective and becomes the order of the Commission, pursuant to section 17(5) of the act upon not less than 30 days notice to the Commission and to the general public, by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

Dated at Washington, D. C. this 28th day of February, A. D. 1962.

By the Commission, John F. Wright, Hearing Examiner.

HAROLD D. McCOY,
Secretary

(SEAL)

Appendix A
[Of Appendix D]

RATES COMPLAINED OF IN DOCKET NO. 33171

Rates on grain and grain products originating in Colorado, Iowa, Kansas, Nebraska and Wyoming when transited at Omaha, Nebraska, and Council Bluffs, Iowa and reshipped to Kansas City and St. Joseph, Missouri, and Atchison, Leavenworth and Kansas City, Kansas.

Appendix B
[Of Appendix D]

RATES COMPLAINED OF IN DOCKET NO. 33338

(a) Rates from points in Nebraska on the Missouri Pacific Railroad to Chicago, Ill., and St. Louis, Mo.

(b) Rates from points in Nebraska, Iowa, and Missouri on the Rock Island Railroad to St. Louis, Mo.

(c) Rates from points in Kansas to destinations in Missouri on the Rock Island Railroad, Missouri Pacific Railroad, St. Louis-San Francisco Railway, and Missouri-Kansas-Texas Railroad.

(d) Rates from points on the Rock Island Railroad in Iowa to destinations in Arkansas.

(e) Rates from points in Texas to St. Louis, Mo.

(f) Rates from points in Colorado and Kansas to Omaha, Sioux City, and Minneapolis.

(g) Rates from Burlington Railroad points in Iowa and Missouri to St. Louis, Mo., and Memphis, Tenn.

(h) Local and proportional rates from Sioux City, Iowa, to Chicago, Ill., and Peoria, Ill., when transited at Omaha.

(i) Local and proportional rates from Sioux City, Iowa, to St. Louis, Mo., when transit is taken at the lower Missouri River markets.

(j) Local and proportional rates from Omaha to Chicago, Ill., Peoria, Ill., and St. Louis, Mo., when transit is taken at the lower Missouri River markets.

(k) Local and proportional rates from lower Missouri River markets to Chicago, Ill., and Peoria, Ill., when transit is taken at Omaha.

(l) Local and proportional rates from Minneapolis, Minn., to St. Louis, Mo., Memphis, Tenn., and destinations in the States of Arkansas, Louisiana, and Texas when transit is taken at Omaha or at the lower Missouri River markets.

Appendix C
[Of Appendix D]

RATES COMPLAINED OF IN DOCKET NO. 33397

(a) Local and proportional rates from Sioux City, Iowa, to Milwaukee, Wisconsin, destined East of the Illinois-Indiana State line and from Omaha, Nebraska, to Kewaunee, Wisconsin, when destined East of the Illinois-Indiana State Line.

(b) Joint through local rates from origins on the Great Northern Railway in Iowa, Minnesota and South Dakota to Chicago, Illinois, and St. Louis, Missouri, published in Great Northern GFO 598-P, I.C.C. No. A-8423 apply via Minneapolis, Minnesota. When transit is taken at Minneapolis, the charges for such service are based on the Minneapolis combination.

(c) Local rates on grain when from CMStP&P Railroad origins in North and South Dakota stored or milled at Minneapolis and the grain or its product reshipped to Duluth.

(d) Local rates from origins on the M&StL Railway in Minnesota and South Dakota to Kansas City, Missouri, Omaha, Nebraska, or Sioux City, Iowa. When milled or stored at Minneapolis, Minnesota, the combination of flat rates to Minneapolis plus the proportional rate beyond is assessed.

(e) Proportional rates from Duluth, Minnesota, to St. Louis, Missouri, when transit is taken at Minneapolis, Minnesota.

(f) Local and proportional rates from Omaha, Nebraska, to Chicago, Illinois, Peoria, Illinois, and St. Louis, Missouri, when transit is taken at Atchison, Kansas, or St. Joseph, Missouri.

(g) Local and proportional rates from Kansas City, Missouri, to Chicago and Peoria, Illinois, when transit is taken at Omaha, Nebraska.

(h) Local and proportional rates from Minneapolis, Minnesota, to St. Louis, Missouri, Memphis, Tennessee, and destinations in the State of Arkansas, Louisiana and Texas when transit is taken at Omaha, Nebraska, St. Joseph, Missouri, or Atchison, Kansas.

(i) Rates on grain and soybeans from stations in Southwestern Iowa and Northwestern Missouri, Transited at St. Joseph, Missouri, or Atchison, Kansas, and reshipped to Eastern destinations.

Appendix D
[Of this Appendix D]

RATES COMPLAINED OF IN DOCKET NO. 33426

Rates on wheat from Minnesota, North or South Dakota, Montana and other Western States and Omaha, Neb., when milled into flour and feed at Minneapolis and reshipped to destinations in Minnesota, Iowa, Wisconsin, Illinois, and via Manitowoc and Kewaunee, Wis., east of the Illinois-Indiana line.

Appendix E
[Of Appendix D]

RATES COMPLAINED OF IN DOCKET NO. 33469

(a) Local and proportional rates from Sioux City, Iowa to Milwaukee, Wisconsin when destined east of the Illinois-Indiana State line, and from Omaha, Nebraska to Kewaunee, Wisconsin when destined east of the Illinois-Indiana State line.

(b) Joint through local rates on grain from origins on the Great Northern Railway in Iowa, Minnesota and South Dakota to Chicago, Illinois and St. Louis, Missouri when transit is taken at Minneapolis.

(c) Local rates on grain from Chicago, Milwaukee, St. Paul & Pacific Railroad origins in North Dakota and South Dakota stored or milled at Minneapolis and the grain or its product reshipped to Duluth.

(d) Local rates on grain from origins on the Minneapolis & St. Louis Railway in Minnesota and South Dakota to Kansas City, Missouri, Omaha, Nebraska, or Sioux City, Iowa, when stored or milled at Minneapolis.

(e) Proportional rates on grain from Duluth, Minnesota to St. Louis, Missouri, when transit is taken at Minneapolis, Minnesota.

(f) Local rates on grain from origins on the Chicago & Northwestern Railway in South Dakota on, north and east of the line Sioux Valley Junction to Watertown, stations in Minnesota on and north of the line Essig to Verdi to Sioux City, Iowa or Omaha, Nebraska when stored or milled at Minneapolis.

Appendix E

Section 4 of the Administrative Procedure Act (5 U.S.C. 1003) provides in pertinent part:

> (a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) provides in pertinent part:

> (e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) un-

supported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (J.S. 1a-7a) is reported at 242 F.Supp. 414. The report of the Interstate Commerce Commission appears at 322 I.C.C. 743.[1]

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[1] The Commission's report is also reproduced as Appendix C to the Jurisdictional Statement filed in the appeal of the Chicago and North Western Railway Company and others.

JURISDICTION

The judgment of the three-judge district court was entered on May 24, 1965 (J.S. 8a). The notice of appeal was filed on July 23, 1965. By orders of September 17, 1965, and November 12, 1965, the district court extended the time to docket this appeal and file the record to November 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

QUESTION PRESENTED

Five complaint proceedings were initiated before the Commission by major grain exchanges, millers, and shippers, having interest in grain shipped through the primary grain markets on the Mississippi and Missouri Rivers, against all the major railroads carrying grain to these points. Each complaint asked the Commission to order the railroads to readjust rate relationships and the availability of transit without reference to the "absolute rate break rule," which, as prescribed by the Commission in the 1930's and sustained by this Court in *Board of Trade* v. *United States*, 314 U.S. 534, operated to establish the minimum rates out of these major river points when interior points were not under the same restriction. All railroads named in the complaints opposed mandatory relief; but one railroad (Chicago and North Western Ry. Co.) requested vacation of the order that had promulgated the rule so as to grant the carriers an option to file rates which departed from the rule. After nearly five years of hearings, briefing, argument and reargument, the Commission en-

tered its report approving the course suggested by the North Western, and entered an order vacating the rule as an absolute requirement, but approving no immediate changes in existing rates. The question presented is whether the Commission in this consolidated rate proceeding was required to enter preliminary opinions or orders forewarning the railroads of the relief it contemplated granting the complainants, in the absence of which its choice of remedies would be limited to those specifically requested in the complaints, where the relief granted was within the scope of the issues presented for decision and well within the area covered by the complaints.

STATUTES INVOLVED

Sections 15(1), 15(2), and 16(6) of the Interstate Commerce Act, 49 U.S.C. 15(1), 15(2), 16(6), and Sections 4(a) and 10(e) of the Administrative Procedure Act, 60 Stat. 238, 243, 5 U.S.C. 1003(a), 1009(e), are set forth for the convenience of the Court in the Appendix hereto, J.S. 9a-12a.

STATEMENT

Shippers of well over 100 millions of bushels of grain (principally wheat in this proceeding) and its products in Western States avail themselves of the privilege of stopping a shipment in transit at the great grain centers on the Mississippi and Missouri Rivers for some purpose incidental to manufacture or trade, such as storage or milling. Under this transit privilege, the grain shipments thereafter proceed on to destination in the East and South on the basis of

the rate established between these primary markets [3] and the destination points. See *Board of Trade* v. *United States*, 314 U.S. 534, 535 *et seq.*

The "rate-break" rule which this Court sustained in *Board of Trade* in effect establishes by rule the minimum rates out of these primary markets on all transited grain.[3] In the 1930's prior to such rule, two systems of rates applied through the primary markets, and the outbound rate depended on the type of inbound billing that the shipper could present on the particular quantity of fungible grain it sought to ship from the primary market point. If grain arrived at the primary market on an overhead through rate, the cost of completing the journey (the "transit balance")[4] might be less than if it arrived under local or proportional rates and completed the journey un-

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[2] The primary or rate-break markets include Atchison, Kansas City, and Leavenworth, Kansas; Sioux City, Iowa; Kansas City and St. Joseph, Missouri; Omaha, Nebraska; and Duluth and Minneapolis, Minnesota. Representative interior markets include Hastings, Fremont, Lincoln, and Nebraska City, Nebraska; Hutchinson, Salina, Topeka, and Wichita, Kansas; Cedar Rapids, Des Moines, and Mason City, Iowa; Sioux Falls, S.D.; and Mankato and Winona, Minnesota. (322 I.C.C. at 744, 747 note 12, 755 note 17).

[3] The rule obtains its name from the fact that it requires one rate be charged on traffic to the market point and a separate outbound rate to another market or destination for a literal "break" in the total rate from origin to destination. See *St. L. S.W. Ry. Co.* v. *United States*, 245 U.S. 136, 139-40 n. 2.

[4] Since the transit balance is computed as the difference between the overhead through rate and the rate from origin to transit point, the transit balances will also vary with the flat rates from origin to transit point. See 322 I.C.C. at 747.

der another proportional rate; for the billing relating to the grain moving on the overhead rates could be used to ship out grain arriving under the latter system of rates and thereby defeat the latter rates. These two rates schemes gave rise in the Commission's view, as this Court noted, to "serious discriminations" in favor of the primary markets with their greater storage capacity and wider selection of inbound billing than interior points (314 U.S. at 539). The Commission, therefore, imposed a "rate-break" requirement, under which minimum rates were established by rule on the outbound shipments from the primary markets. The rule did not apply to the interior markets, which retained varying transit balances.

During the 12-year course of the proceedings which led to the *Board of Trade* case, the primary markets complained against this different treatment and sought an order requiring the railroads to stop relying upon the rate-break rule. The Commission at that time concluded, however, as this Court stated, "that the record did not justify the mandatory order sought by the markets. Instead, it authorized the carriers by appropriate tariffs to make 'restricted departures from the exclusive application of proportional rates at rate-break points for a limited period of time.'" (314 U.S. at 545). When the carriers "declined to act on this authorization, the markets again sought a compulsory order." But, the Commission decided to give the absolute rate break requirement a test over "an adequate period of normal con-

ditions in the grain trade," and accordingly dismissed the complaints and withdrew its previous permission to the carriers voluntarily to establish the rates requested by the primary markets. (*ibid.*). This Court sustained the experiment.

From August 10, 1959, to the summer of 1960, numerous grain exchanges, boards of trade, and milling interests in the Midwest [5] involving the same primary markets, filed complaints with the Commission again seeking mandatory relief from the rate-break rule, that is an equality of rates with interior points or more extensive transit privileges. They urged that conditions had changed since the original promulgation of the rule, and argued both, 1) that the rates out of these individual primary markets were unjust and unreasonable, and unduly preferential and prejudicial, and 2) that the absolute rate break rule was an unjust and unreasonable regulation.[6]

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[5] These complainants included the Omaha Grain Exchange, Minneapolis Grain Exchange, The Pillsbury Company, Archer-Daniels-Midland Company, Atchison Board of Trade, The St. Joseph Grain Exchange, Board of Trade of Kansas City, Mo., Bay State Milling Company, and Wolcott & Lincoln, Inc. (322 I.C.C. at 776-77).

[6] For example the complaint of the Atchison Milling Company in Docket No. 33426 alleged that "complainant has been subjected to the restrictions" of the absolute rate-break rule "since the Commission's decision in I.C.C. Docket 17000 (205 I.C.C. 301), except for a brief period between August 23, 1937, and March 31, 1939 . . .". (para. VII); that conditions have now changed since the "prescription of the so-called 'Rate Break' Rule (I.C.C. 17000) . . ." (para. XIII); and prayed the Commission order the appellee railroads to "maintain and apply to the transportation herein described in lieu

In its detailed report of June 5, 1964, the Commission reviewed the exceptions which had been created over the past 30 years to the mandatory application of the rate-break rule. It noted that the rule had never applied on export traffic, which amounts to nearly one half billion bushels per year (322 I.C.C. at 753); and that in 1956 the rule was vacated with respect to all coarse grains (such as corn) (at 754). Nevertheless, the Commission could not on the present record grant mandatory relief from the operation of the rule.

The Commission found that, "the present-day differences in conditions asserted by complainants are not so substantial as to warrant a finding different from that in *Board of Trade*" (at 771). The relief requested by the complainants would permit shippers to defeat the presently established rates out of the primary markets by merely substituting billing on identical quantities of fungible grain. (at 762-64). The Commission found no change in marketing conditions of flour since 1935 which placed Minneapolis at a rate disadvantage (at 767-68); nor any "persuasive evidence on this record that the other primary markets have suffered material injury as a result of the rate-break combinations on wheat and products thereof." (at 769). The report then essentially re-

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of the rates, charges, and regulations hereinbefore referred to such other rates, charges and regulations as the Commission may deem reasonable and just and free from undue prejudice * * *."

peated the findings which originally led the Commission to prohibit a dual system of rates at the primary markets and which were sustained in *Board of Trade*:

> Experience has shown that the existence of such an extensive dual system of rates from the primary markets might result in the destruction of the grain rate structure; injury to the grain market process; competitive injury to shippers at the interior markets; and revenue losses to the rail carriers. (at 770).

The Commission, however, did not see that its work was at an end in denying the mandatory relief asked in the complaints. It expressed the belief that prior decisions of this Court required it to exercise its discretion and to consider alternative forms of relief, including relief "less than that sought in the complaints"; it, therefore, considered "the possibility of merely vacating the mandatory aspect of the rate-break rule, an alternative sought by the C.&N.W. [Chicago & North Western Ry. Co.]" (at 773).

The Commission noted that the rule has certain "indirect adverse effects on the public," since its absolute mandatory form "results in a rather static situation within the western district although there has been a continuous development of advancements . . . and resulting rate reductions, in connection with the movement of grain in other areas." *(ibid.)* The rule precludes the establishment of rates without the expensive feature of transit; and may have a restrain-

ing effect on the railroads' ability to meet unregulated competition. In the Commission's view the rule has resulted in "an inertia resisting change." (at 774).

The Commission concluded that vacation of the mandatory order, as suggested by the North Western during the course of the proceeding, would be beneficial. Such relief would not authorize any immediate change in rates, which would remain subject to the suspension powers of the Commission, but would simply provide the carriers with "an opportunity for competitive initiative." (at 775). Citing Section 16 (6) of the Act, the Commission entered an order under the docket numbers of the complaints and under the number of the old case (Docket 17000, Part VII) vacating and setting aside the rule to the extent it required "observance of rate-break combinations and of proportional rates therein prescribed as the exclusive basis of charges on shipments of grain and grain products at points from which proportional rates are applicable." One of the eleven Commissioners dissented; two others did not participate.

The district court reversed the Commission, not on any grounds relating to the merits of the order, but on grounds that the appellees, each of which participated in the Commission proceeding, had not received "clear, decisive notice of the Commission's contemplated enlargement of the issues in the proceeding and of the proposed amendatory action in Docket 17000, Part VII." (J.S. 6a). It rested its decision entirely on the alleged failure of the Commission to give "any notice that it contemplated reopening Docket

17000, Part VII" nor notice of the "proposed modification" of this old order to make observance of the 'rate-break' rule voluntary or permissive instead of mandatory throughout the entire Western district." (J.S. 4a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The judgment of the district court would narrow the choice of relief which the Commission may consider in lengthy cases involving intricate grain adjustments and conflicting interests in a vast geographical area to the specific relief requested in complaints of the market interests and served on defending railroads. The Commission's choice is narrowed, unless it serves predecisional notice of the relief it contemplates, regardless of the position of the railroads in the matter, or, what is perhaps more significant, regardless of the public interest in the Commission's fashioning a lesser form of relief based on the record before it.

1. The judgment of the lower court is contrary to the ruling of this Court in *Board of Trade* v. *United States*, *supra*, where this Court stated that even though the complaints, as here, sought mandatory relief, "the Commission had several choices before it." The Commission was not sitting to adjudicate private claims against the railroads but to investigate the grain rate structure. "Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wis-

dom of the expert body." (314 U.S. at 547). As this Court stated in *Board of Trade*, the Commission "might have abolished the privilege of free transit entirely" (at 547); so little was the Commission's discretion to grant appropriate relief dependent upon the requested relief of the markets that it might have reached a solution exactly the opposite of that requested by the markets, and not merely lesser relief of the same order, as the Commission now has afforded those markets.

Indeed, the present course adopted by the Commission after nearly five years of litigation is not unique or novel, but was entered in the past and approved by this Court in *Board of Trade*. During the long course of that proceeding before it reached this Court, the Commission had also concluded it could not on the record before it grant mandatory relief, but would allow the carriers to propose departures from the rule for a limited period of time. See page 5, *supra*. The railroads are likewise permitted to depart from the rule by the present order, but with the added safeguard that the Commission will review each proposal and use its suspension powers where individual proposals fail to meet the requirements of lawfulness under the Act. (322 I.C.C. at 775).

2. The Court below reversed the Commission for doing precisely what the Supreme Court recently ordered the Commission to do in *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, and in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, both cited by the Commission (at 773). In each of those cases, this Court ordered the Commission to

exercise a judgment in "choosing a proper remedy," for the "agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case . . .". (371 U.S. at 130). This choice of remedy, however, "may not be automatic; it must be rational and based upon conscious choice" exercised in the circumstances of the particular case (371 U.S. at 167).

This Court stated in *Gilbertville* that a prerequisite to review is that "the parties were heard on the issue." (at 130); the referenced issue was the broad *choice* of remedy and not, as found below, the terms of the specific relief contemplated by the Commission in a predecisional notice, or in the absence thereof the specific relief asked in the complaints. The court below overreached the province of judicial review, which "extends no further than to ascertain whether the Commisson made an allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612.

3. The decision below conflicts with this Court's opinion in *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572, where the Board also failed to give predecisional notice of the relief it contemplated, but was sustained in granting relief even beyond the application before it.[7] It was held sufficient that the relief granted was in the "general area covered by the consolidated hearings" (at 577); for it would "exalt

[7] On the other hand, the present complaints also contained a "catchall clause" requesting other appropriate relief comparable to the one in *State Airlines*. Compare note 6, *supra*, with 338 U.S. at 577.

imaginary procedural rights above the public interest to hold that the Board is hamstrung by the lack of foresight or skill of a draftsman in describing routes" prior to final decision. (at 578).

The appellee railroads argued below, that if they had known during the course of the hearings that the Commission contemplated vacation of the rate-break rule, they would have offered evidence to refute it; and the court below similarly held that appellees "cannot be expected to grope through the litigation" (J.S. 6a). The fact is that the Chicago & North Western Railway consistently urged before the Commission the very relief that the Commission adopted. Its witness stated in his direct testimony: [8]

> It is the position of this carrier that if the Commission considers any departure from the absolute rate break rule then it must also, for orderly and equitable marketing of grain, require the vacation of the outstanding orders in connection with Docket 17000 Part 7 as to all grains not otherwise previously vacated under supplemental orders of the Commission, and that carriers be authorized to exercise their managerial discretion in the making of rates on wheat, wheat products and other grains and their products, subject only to the retention of the maximum reasonable provisions of Docket 17000 Part 7.
>
> * * * *

[8] Exhibit No. 119, pp. 5, 10. In a brief to the Commission filed August 31, 1961, the North Western reiterated, "we seek the alternative of a complete vacation of a rate-break construction permitting the exercise of managerial discretion in rail rate making." (p. 3).

> Under these circumstances, then, either the complaints should be dismissed or the order of the Commission in the Grain Case as amended, should be vacated in a manner similar to the action of the Commission concerning the coarse grain adjustment.

In *State Airlines* the complaining carriers were given only a limited rehearing to offer new evidence. Here appellees had actual notice from the date of the original hearing that vacation of the rule was a form of remedy sought in the proceeding; and yet they proffered no evidence to rebut the North Western's presentation. Just as the Board was not limited to the scope of the relief requested in the applications, the Commission here should not be restricted to the specific relief requested in the complaints; in each case the standard under which "the public interest is given a paramount consideration is a correct standard" (328 U.S. at 580), and in neither case was a fair hearing denied.[9]

4. The Court below imposed upon the Commission a stricter notice standard than applies in civil actions in district courts. Rule 54(c) of the Federal Rules of Civil Procedure require that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

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[9] Moreover, having actual notice of the scope of the proceeding, appellees were not prejudiced by the absence of other, formal notice; and the court below erred in failing to take proper account of the rule of prejudicial error. See Administrative Procedure Act, Sec. 10(e), 60 Stat. 243, 5 U.S.C. 1009(e).

Under the latter rule, "the nature of the order to be entered is to be determined by what the facts establish, not what the lawyer prays for." *South Fall Corporation* v. *Rochelle*, 329 F.2d 611, 619 (5th Cir. 1964).[10] In contrast the Court below would without precedent read Section 16(6) of the Interstate Commerce Act, 49 U.S.C. 16(6), and Section 4 of the Administrative Procedure Act, 60 Stat. 238, 5 U.S.C. 1003, as limiting an administrative agency to the specific pleadings of the complainant or the bounds of foresight established in a predecisional notice of the agency.

CONCLUSION

The district court's order sweeps aside five years of administrative proceedings with the bare holding that the Commission should have foreseen from the start the result it would reach in ordering an adjustment in the vastly complicated field of grain rates. The court relies upon no policy justification for its novel notice requirement, which it imposes in a manner more demanding of the agency than the federal rules of civil procedure are of courts in civil actions. The court relies upon no real prejudice to the appellee railroads, which from the date of the original hearings were made aware that at least one party, and others

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[10] See also *Mass. Bonding & Ins. Co.* v. *State of New York*, 259 F.2d 33, 40 (2d Cir. 1958); *Schoonover* v. *Schoonover*, 172 F.2d 526, 530 (10th Cir. 1949); *Cohen* v. *Randall*, 137 F.2d 441, 443 (2d Cir. 1943), cert. denied 320 U.S. 796; *Kansas City, St. Louis & C.R.Co.* v. *Alton R. Co.*, 124 F. 2d 780, 783 (7th Cir. 1941).

inferentially, sought vacation of the mandatory rate break rule. The district court has so restricted the Commission's choice of relief in rate cases of the present type so as to seriously impair its decisional function. This appeal presents substantial questions in the administration of the Interstate Commerce Act and probable jurisdiction should be noted.

Respectfully submitted,

ROBERT W. GINNANE,
General Counsel,

LEONARD S. GOODMAN,
Assistant General Counsel,

Interstate Commerce Commission.

November 1965.

APPENDIX

UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

64 C 2014

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

MEMORANDUM OPINION

Before CASTLE, Circuit Judge, and PERRY and AUSTIN, District Judges.

PERRY, District Judge. Plaintiff railroads in this action under Sections 1336, 1398, 2284 and 2321 through 2325, inclusive, of Title 28, United States Code, seek to suspend, enjoin, annul and set aside the Interstate Commerce Commission's order of June 5, 1964, entered in proceedings designated before the Commission as Docket No. 17000, Rate Structure Investigation, Part VII, Grain and Grain Products Within the Western District and For Export, in so far as that order modifies previous orders in said proceeding dated October 22, 1934 and March 4, 1936. (Reference hereinafter made to "plaintiffs" will include those who have intervened as plaintiffs in this action.)

This cause came on for hearing before a duly designated three-judge statutory court which finds that it

has jurisdiction of the subject matter hereof and of the parties hereto.

It appears that in 1959 and 1960 five separate complaints, presenting similar issues, were filed with the Interstate Commerce Commission and consolidated for hearing and disposition, and that after proceedings had, the Commission on June 5, 1964, filed its Report and entered its order.

On page 755 of its Report, the Commission said:

> "As indicated in appendix A, the complainants allege that the rate-break combinations applicable on certain grain shipments transited at the considered primary markets are unjust and unreasonable, unduly discriminatory, and subject the complainants to undue prejudice and disadvantage to the undue preference and advantage of other interior transit points and operators who are permitted to transit similar shipments at lower rates.
>
> "It should be stressed that the level of the considered rates is not in issue. Moreover, the complainants concede that on the great majority of the considered traffic, which flows from west to east, the normal drawing areas for each of the primary markets are territories from which there are no through rates by way of these markets less than the rate-break combinations, and therefore present no problem to the primary market. *However, it is contended that on a small but important segment of the traffic* the rates applicable on shipments transited at the primary markets subject those markets and the transit operators located thereat to an unreasonable handicap in competing with interior markets and transit operators. It is only in instances

> where a one-factor through rate from origin to transit destination, lower than the rate-break combination applicable on shipments transited at a particular primary market, applies through that primary market on shipments transited at interior points, that the rate-break combinations are alleged to be unlawful. Complainants seek transit on these lower rates through the primary markets. * * * *" (Emphasis supplied) *

The Commission's order of June 5, 1964, here under attack, dismissed the complaints but it did not stop there. Although the considered rates applied only to limited and specified areas, and although the Commission's Report recognized that complainants' contentions related to a "small but important segment of the traffic," the Commission further ordered—

> "That the proceeding in Docket No. 17000, Rate Structure Investigation, Part VII, *Grain and Grain Products Within the Western District and for Export*, 205 I.C.C. 301 and 215 I.C.C. 83, be, and it is hereby, reopened for reconsideration, and that the orders entered therein, on October 22, 1934, and March 4, 1936, respectively, be, and they are hereby, modified so as to be vacated and set aside to the extent that they require observance of rate-break combinations and of proportional rates therein prescribed as the exclusive basis of charges on shipments of grain and grain products at points from which proportional rates are applicable."

thus abolishing the absolute "rate break" rule not only as to the limited area covered by the five com-

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* See *Board of Trade* v. *United States*, 314 U.S. 534, for meaning of terms used in Commission's Report and order.

plaints but also throughout the entire Western district.

It appears that at no time did the Commission give any notice that it contemplated reopening Docket 17000, Part VII, nor did it give any notice in Docket 17000, Part VII of the proposed modification of the orders of October 22, 1934 and March 4, 1936 to make observance of the "rate-break" rule voluntary or permissive instead of mandatory throughout the entire Western district.

Plaintiffs base this suit on the failure of the Commission to comply (a) with Section 16(6) of the Interstate Commerce Act (49 U.S.C. § 16(6) and (b) with Section 4 of the Administrative Procedure Act (5 U.S.C. § 1003) which prescribes rulemaking procedures.

Plaintiffs do not gainsay the authority of the Commission to act or rule in the premises but contend that such action and ruling should have been preceded by notice in order to afford plaintiffs an opportunity to be heard and to present data on the question of the vacation of the absolute "ratebreak" rule throughout the entire Western district. They contend that their arguments made and data presented before the Commission were confined to the places and traffic involved in the proceedings on the five complaints.

It is interesting to observe that the recommended Report and order prepared and filed by the Examiner, who held lengthy hearings in the matter of the five complaints, contains the following paragraph relating to the issues:

> "All of the complaints challenge the legality of charges on grain and grain products caused by the absolute rate-break rule with respect to certain of its applications at Minneapolis, Minn.,

> and the lower Missouri River markets of Kansas City, Omaha and St. Joseph, Mo., and Kansas City, Atchison and Leavenworth, Kans. While one of the complaints attacks the lawfulness of the rule *per se*, the evidence is confined to specific rate situations. Only the lawfulness of these is considered herein. Relief is sought only as to existing rates and existing routes,"

to which limitation of the issues no exception was taken.

It appears that at one point during the proceedings before the Commission on the five complaints, the Secretary of Agriculture of the United States, an intervenor, requested that Docket 17000, Part VII, be included in the proceedings but the request was denied by the Commission.

Re: Notice required by Section 16(6) of Interstate Commerce Act

At page 775 of its Report the Commission said that its action in vacating the mandatory aspect of the rule was done pursuant to its authority under Section 16(6) of the Interstate Commerce Act. That section provides that "The commission shall be authorized to suspend or modify its orders upon *such notice* and in such manner as it shall deem proper." (emphasis supplied). Clearly the giving of some form of notice is contemplated by the statute.

Re: Notice required by Section 4 of the Administrative Procedure Act.

In Docket 17000, Part VII, the Commission prescribed a mandatory rule known as the "ratebreak system" which was in effect throughout the entire Western district. " 'Rulemaking' means agency process for the formulation, amendment, or repeal of a

rule" (5 U.S.C. § 1001(c)) and the Commission's action in modifying the orders in Docket 17000, Part VII, and making permissive or voluntary that which had theretofore been mandatory, constituted "rule-making."

Section 4(a) of the Administrative Procedure Act provides that

> "General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings . . . ."

The order of June 5, 1964 does not come within any of the exclusionary provisions of Section 4 which excuse compliance with notice requirements.

Defendants contend that plaintiffs had sufficient actual notice. However, notice cannot be ascribed to these plaintiffs because they were present and participated in the five-complaint proceedings before the Commission. Parties to proceedings cannot be expect to grope through the litigation. These plaintiffs were entitled to clear, decisive notice of the Commission's contemplated enlargement of the issues in the proceeding and of the proposed amendatory action in Docket 17000, Part VII. We agree with Vice Chairman Webb who stated in his dissent that "No segment of the grain trade and no carrier had any reason to suppose that any such drastic action was within the scope of this proceeding."

For reasons herein stated, the Court finds that the order of the Interstate Commerce Commission dated June 5, 1964, in the Commission's Docket 17000, Part VII, *Grain and Grain Products within the Western*

District and for Export, to the extent that said order modifies prior orders in said Docket entered October 22, 1934 and March 4, 1936, is void and concludes that said order to the extent herein above specified must be vacated and set aside and its enforcement permanently enjoined, all without prejudice to further proceedings before or by the Interstate Commerce Commission not inconsistent with this opinion.

In arriving at our conclusions herein this court is not considering or passing on the question of whether orders of the Interstate Commerce Commission respecting freight rates applicable to grain or grain products, freight rates applicable or the rules governing such rates should be modified or changed in an appropriate proceeding by the Interstate Commerce Commission.

This memorandum opinion shall constitute the court's findings of fact and conclusions of law.

Judgment in accordance with opinion.

Dated: Chicago, Illinois, May 24, 1965.

/s/ Latham Castle
United States Circuit Judge

/s/ Sam Joseph Perry
United States District Judge

/s/ Richard B. Austin
United States District Judge

UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

No. 64 C 2014

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

JUDGMENT ORDER

This cause having come on to be heard before a statutory three-judge court, and briefs having been submitted, the cause having been argued by counsel, and the court having on this date filed its memorandum opinion,

It is ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission dated June 5, 1964, in the Commission's Docket 17000, Part VII, *Grain and Grain Products within the Western District and for Export*, to the extent that said order modifies prior orders in said Docket entered October 22, 1934 and March 4, 1936, be and it is hereby vacated and set aside, and its enforcement permanently enjoined, all without prejudice to further proceedings before or by the Interstate Commerce Commission, not inconsistent with this court's aforesaid memorandum opinion filed herein.

ENTER:

/s/ Latham Castle
United States Circuit Judge

/s/ Sam Joseph Perry
United States District Judge

/s/ Richard B. Austin
United States District Judge

Dated: Chicago, Illinois, May 24, 1965.

STATUTES INVOLVED

Section 15(1) of the Interstate Commerce Act, 49 U.S.C. 15(1), provides:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or

will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15(2) of the Interstate Commerce Act, 49 U.S.C. 15(2) provides:

> Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Section 16(6) of the Interstate Commerce Act, 49 U.S.C. 16(6) provides:

> The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Section 4(a) of the Administrative Procedure Act, 5 U.S.C. 1003, provides:

> * * * General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and

nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e) provides:

> * * * So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise re-

viewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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Nos. 751 and 752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 751

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
Appellants,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al.,
Appellees.

No. 752

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

MOTION TO AFFIRM

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Nos. 751 and 752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 751

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
Appellants,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al.,
Appellees.

No. 752

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the six appellee railroad companies[1] and appel-

[1] Chicago, Burlington & Quincy Railroad Company, Great Northern Railway Company, Northern Pacific Railway Company, Soo Line Railroad Company, Union Pacific Railroad Company, and Norfolk and Western Railway Company.

lees Public Service Commission of North Dakota, North Dakota Mill and Elevator Association, and Grand Forks Chamber of Commerce of Grand Forks, North Dakota, move that the judgment of the District Court be affirmed on the ground that it is manifest that the question on which the decision of these appeals depends is so unsubstantial as not to need further argument.[2]

STATEMENT

These are direct appeals from a final judgment entered May 24, 1965, by a unanimous three-judge district court convened pursuant to Section 28 U.S.C. 2284 and 2325, setting aside an order of the Interstate Commerce Commission entered June 5, 1964, which modifies outstanding orders entered October 22, 1934, and March 4, 1936, in the Commission's comprehensive general grain rate investigation, Docket 17000 Part VII, *Grain and Grain Products Within the Western District and for Export*,[3] so as to eliminate the requirement throughout the entire Western district for the mandatory rate-break rule on shipments of grain and grain products moving via primary markets.[4]

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[2] The district court's memorandum opinion is reproduced as an appendix to the jurisdictional statements in each appeal (I.C.C. J.S. 1a; C&NW J.S. App. A) and is reported at 242 F. Supp. 414.

[3] Herein called *Grain and Grain Products*.

[4] For an explanation of the terminology used in describing the grain rate structure see *Board of Trade of Kansas City v. United States*, 314 U.S. 534, 535-543, *Grain and Grain Products*, 164 I.C.C. 619, 633-635, and the Commission's report (C&NW J.S. App. C), 322 I.C.C. 743 at 747.

For convenience the principal definitions are reproduced as an appendix to this Motion.

The district court held that the June 5, 1964, order making this general modification was void because it was entered without the notice required by Section 16(6) of the Interstate Commerce Act, 49 U.S.C. Section 16(6), and Section 4 of the Administrative Procedure Act, 5 U.S.C. Section 1003, but did not pass on the question whether these long-standing requirements might be changed in an appropriate proceeding (242 F. Supp. at 417).

The Question Presented

To show clearly the question presented by these appeals it is necessary to outline briefly the proceedings before the Commission and the court below.

After a general grain rate investigation extending over almost a decade, in Docket 17000 Part VII, *Grain and Grain Products*, the Commission entered orders on October 22, 1934, and March 4, 1936, requiring throughout the entire Western district[5] the observance of rate-break combinations and of proportional rates therein prescribed on shipments of grain and grain products moving via primary markets, whether stopped in transit or not. (205 I.C.C. 301; 215 I.C.C. 83 at 87; 322 I.C.C. at 750)

For more than a quarter century the absolute rate-break system has been the basic structure on which domestic shipments of wheat and its products, and to a large extent other grains and grain products, move by rail from west to east through the nation's great Midwestern grain markets.

In 1959 and 1960 five complaints were filed with the Commission on behalf of milling companies and other business

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[5] The entire area "on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois." *Board of Trade of Kansas City v. United States*, 314 U.S. 534, 536.

interests at six of the eight principal primary markets, which challenged the carriers' maintenance of the rule on certain shipments moving over specified routes in limited areas of the West. The Commission described the complaints as covering "a small but important segment of the traffic" (322 I.C.C. at 755) but not "the great majority of the traffic which would continue to move under the rate break combinations" (*id.* at 756).

The five cases were consolidated for hearing and disposition. After hearings, briefs and oral argument, and submission of the cases in October, 1962, the Commission sustained the rate-break rule as lawful on the limited traffic in issue and dismissed the five complaints by a report and order dated June 5, 1964, but at the same time it entered an order in Docket 17000 Part VII, *Grain and Grain Products*, which both reopened and simultaneously modified the rate-break rule as it applied on traffic throughout the West moving via primary markets, making maintenance of the rule permissive rather than mandatory.[6]

This general modification was made even though (a) the five complaints were separately docketed under specific numbers; (b) Docket 17000 Part VII had not theretofore been reopened or included in the consolidated proceedings embracing the five complaints; (c) the Commission had not given prior notice that it contemplated or was to consider any reopening of Docket 17000 Part VII or modification of the rate-break rule as it applied generally; and (d) during the hearings in the five complaint cases an effort to bring into issue the question whether Docket 17000 Part VII should be reopened

[6] Under the Administrative Procedure Act "rulemaking" includes the "formulation, amendment, or repeal of a rule." 5 U.S.C. Sec. 1001 (c).

and the general outstanding orders modified had been expressly denied.[7]

Appellee railroads, joined by the North Dakota appellees, asked the district court to set aside the modifying order on the principal ground that the Commission had given no notice that such action would be considered, as required by Section 16(6) of the Interstate Commerce Act and Section 4 of the Administrative Procedure Act.

The sole question decided by the court below was whether or not notice was given. With the entire record of the Commission before it, the three-judge court found unanimously that there was no such notice and therefore concluded that the order was void.

Appellants do not question that a notice relating to the issue of a general modification of these comprehensive orders, as distinguished from an order affecting the application of the rule on the limited traffic covered by the five complaints, was required. The sole question to be decided on these appeals is whether the district court correctly determined that such notice had not been given.

The Administrative Proceeding

The interest of the North Dakota appellees, as well as that of the railroad appellees in continuance of the mandatory rate-break rule is evident from the Commission's often-quoted statement that disruption of the rate-break combinations would:

> "* * * disorganize the general rate structure, make uncertain in advance the outbound basis of charge, give undue preference to the users of transit balances over

[7] Commission order of April 19, 1961, third par. and final par.

> the users of proportional rates, depress the price of grain at the rate-break markets and, by direct reflection, at the country points, and reduce the revenues of the carriers." (205 I.C.C. at 334).[8]

An exception to the general rate-break rule stems from the Commission's expressed intention "not * * * to prevent carrier competition that does not disrupt the basis of making rates by combinations on the primary markets" (164 I.C.C. 619, 645). The exception permits the establishment of a competitive overhead rate over a route passing through a primary market to meet another single-factor rate between the same points applicable over another route by-passing such market. Transit is permitted on such an overhead rate but only at interior points on the route and not at the primary market, where the general rule for rate-break combinations applies. A practical illustration of the exception is set out in *Board of Trade*, 314 U.S. at 543 as follows:

> "At all interior points lying on routes from Kansas City to Chicago, transit privileges were available at the 16 cents rate, while shipments stopping for transit at primary markets along such routes, e.g., Omaha, Atchison, Leavenworth, and St. Joseph, could move only at the rate-break combination of the 6½ cents inbound rate and the 16 cents outbound rate."

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[8] Contrary to appellant Commission's present characterization of these proportional rates as "minimum rates" (J.S. 2, 4), the Commission's orders of 1934 and 1936 prescribed them as maximum rates. The effect was to reduce most of the proportional rates then effective (*Grain and Grain Products*, 205 I.C.C. 301, 472, 486; 215 I.C.C. 83, 96-98).

Under the existing rate-break system "* * * reduced rail rates have been established both in the West and South to meet motor carrier competition." *Southeastern Association of Railroad and Utilities Comm'rs v. A.T. & S.F. Ry. Co.* (1964), 321 I.C.C. 519, 545-546.

In *Board of Trade* this Court sustained such a differentiation between primary markets and interior points.

It was this exception, not the general application of the rule, which brought about the five individually docketed complaint cases which were the subject of the Commission's report at 322 I.C.C. 743 (C&NW J.S. Appendix C). Thus the Commission, in describing the allegations of the five complaints, stated (322 I.C.C. at 755-756):

> "It is only in instances where a one-factor through rate from origin to transit destination, lower than the rate-break combination applicable on shipments transited at a particular market, applies through that primary market on shipments transited at interior points, that the rate-break combinations are alleged to be unlawful."

And further:

> "The complainants do not seek new rates or routes, but seek only transit on the lower rates through the primary markets which is now available to the interior points. According to the complainants, such privileges would in no way affect the great majority of the traffic which would continue to move under the rate-break combinations." (322 I.C.C. 743, 756)

The portion of the Commission's report quoted by the district court (242 F. Supp. 414, 415) likewise demonstrates the definite limitation on the issues involved:

> "Moreover, the complainants concede that on the great majority of the considered traffic, which flows from west to east, the normal drawing areas for each of the primary markets are territories from which there are no through rates by way of these markets less than the rate-break combinations, and therefore present no problem to the primary market. *However, it is contended that on a small but important segment of the traffic* the rates applicable

on shipments transited at the primary markets subject those markets and the transit operators located thereat to an unreasonable handicap in competing with interior markets and transit operators." (Emphasis the court's.)

While appellants now suggest that these complaints raised somewhat broader issues (Commission J.S. 6; C&NW J.S. 3, 6-8), such a conclusion is not supported by the pleadings themselves, which specify the transportation involved,[9] and is contradicted by assertions of complainants throughout the proceedings[10] and by the treatment of the issues by the examiner and by the Commission.[11]

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[9] Each of the complaints attacked the rate-break rule and the charges resulting from its application only as to shipments transported over limited routes. This is true not only of the Atkinson Milling Company complaint (Commission J.S. 6, fn: 6) but also of those complaints attacking as an unreasonable regulation the tariff rule quoted in C&NW's Jurisdictional Statement at Appendix D-3. (See complaints in Docket 33426 (Atkinson), pars. VII, VIII, IX, XII, XIV, XVI, XVII; Docket 33397, pars. V, VI, VII, VIII; Docket 33469, pars. V, VI, VII, VIII, IX; Docket 33171, pars. IV, VI, VIII, IX, X, XI; and Docket 33338, pars. V, VI, VII, VIII, IX.

The complaints contain a further limitation also: They do not challenge the application of the rate-break rule on any shipments stopped for transit at the primary markets of Duluth, Minn., or Sioux City, Iowa (see list of primary markets included in the complaints at 322 I.C.C. 744 and at C&NW J.S. Appendix D-2). (Sioux City was permitted to intervene on petition filed at the June 13, 1960, hearing on condition that the issues be "not unduly broadened" under the Commission's General Rules of Practice, Rule 72, governing interventions, 49 U.S.C.A. 298).

[10] For example:

> "Atkinson would like to respectfully draw the Commission's attention to the fact that its complaint involves only one isolated situation, that is wheat from Omaha, Nebraska, when from beyond, shipped to Minneapolis, Minnesota, for milling into flour, and the flour reshipped to Eastern Territory." (R. 1621)

(See also R. pp. 25 and 1588; Pillsbury's Reply to Exceptions, pp. 3, 5.)

[11] As noted by the district court. See *infra* pp. 13-14.

North Western asserts that during the course of the administrative proceeding "it actively advocated vacation of the [rate-break] rule throughout the West" (C&NW J.S. 7). On these appeals the Commission supports that assertion (J.S. 13-14). However, such advocacy by North Western during the hearings and on brief to the examiner was for vacation of the rule "*through the medium of a petition* for modification and reopening of the 17000 Part VII order" (emphasis supplied, R. 24-25; Exh. 119, p. 4) or, stating the same proposal in another way, "* * * in a manner similar to the action of the Commission concerning the coarse grain adjustment,[12] an action of the Commission which took place only after the filing of a petition in Docket 17000 Part VII for vacation of the rule as to coarse grains and the holding of a hearing on

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[12] Exh. 119, p. 10, quoted in Commission J.S. 13-14; C&NW Brief to the Examiner, 16.

When Exhibit 119 was offered, a practitioner representing complainant Atkinson sought enlightenment on C&NW's position:

> "Q. (By Mr. Springrose) I would like to ask in connection with Page 4 of your written statement, you refer to the suggestion of the North Western Railroad that the proper procedural approach to this problem would be through the medium of a petition for a modification, and so forth, of Docket 17000 Part 7. A number of cases are here consolidated and in the Atkinson Flour Mills case we have only one situation with which we are concerned, and I was wondering if you felt that it would be necessary to go through all of the procedural motions that would be necessary to reopen 17000 in order to dispose of an isolated problem such as we have submitted in our complaint. Would you have any comment on that?
>
> "A. Well, the statement was made at the June 13 hearing and was overruled by the examiner at that time. My comment would be that the essence of the complaints lies in one thing—"

Further answer was objected to by North Western's counsel on the ground that the question "calls for a legal conclusion," and the objection was sustained. (R. 1245)

that territory-wide issue. (*Grain and Grain Products*, 298 I.C.C. 261, 262) North Western's very suggestion that such a petition should be filed negated the notion that the issues had already been broadened. North Western's suggestion was objected to by the complainant markets,[13] and the only such petition which was filed during the period of the hearings, by the Department of Agriculture, was denied by the Commission "for the reason that sufficient grounds have not been presented to warrant granting" the petition.[14]

After the hearing record was closed and on exceptions to the examiner's report, North Western urged for the first time that the Commission in disposing of the cases then under consideration should eliminate the mandatory feature of the rate-break rule throughout the West. Appellee railroads and one of the principal complainants called attention to the fact that this suggestion was outside the scope of the issues heard.[15] The Commission then noticed the five complaints for oral argument without including any reference to Docket 17000 Part VII,[16] and at the argument North Western's statement of the issues was disputed by the appellee carriers but not ruled upon (R. 1666).

In defending the lawfulness of the rate-break rule as it applied to the traffic in issue in these five cases, appellee railroads, defendants before the Commission, pointed to the generality of the rule throughout the West and to circumstances

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[13] Counsel for complainants: "It is pretty late to raise issues like that." (R. 25)

[14] Footnote 7 *supra*.

[15] Reply of Defts. to Exceptions of C&NW, 2; Reply of Pillsbury, 3.

[16] Notice of August 3, 1962, assigning oral argument October 5, 1962.

showing it to be a reasonable and lawful regulation, but, as above indicated, disputed North Western's contention, advanced on exceptions and in oral argument, that the vacation of the mandatory rate-break rule throughout the West was within the issues for determination.[17]

The Commission's Report

Thirty printed pages of the 33-page report are devoted to an analysis of the five complaint cases which were dismissed (322 I.C.C. from 743 to 772).

The final three pages set out the reasons which persuaded the Commission to reopen Docket 17000 Part VII and to modify, simultaneously and with no advance notice, the outstanding orders requiring the maintenance of the absolute rate-break rule throughout the West. The Commission first characterized this contemplated reopening and modification of the Docket 17000 orders as "an alternative" and "a form of relief less than that sought in the complaints." In the subsequent discussion it is clear, however, that such action was being taken through the reopening of another docket, "pursuant to our authority under section 16(6) of the Act." (322 I.C.C. 743, 775)

Despite the fact that earlier in its report the Commission had "stressed that the level of the considered rates is not in issue" (322 I.C.C. at 755), and that it had found the absolute rate-break rule "not shown to be unreasonable" and the

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[17] Reply of Defendants to Exceptions of C&NW, 2. See also R. 1666:

> "The carriers that I represent flatly disagree with the Chicago and North Western Railroad. * * * We * * * think it is clear that this case, the issues in this case do not encompass any abolition of the rate-break structure as a whole."

charges resulting therefrom "not shown to be unjust, unreasonable or otherwise unlawful," and had ordered dismissal of the five complaints (322 I.C.C. at 772), it undertook to review what it considered to be the effect of the mandatory rate-break rule on the "level of rates" maintained, not only in limited areas or over specified routes, but in respect to the great majority of traffic moving under the widespread rule and not embraced in the complaints.

In making this review it commented on rate reductions "in other areas" as compared with "a rather static situation within the western district." Though cost of service was not an issue (since the five cases did not involve rate levels), the Commission stated that the rate-break rule requires rates "without significant regard to costs, a factor we recognize of extreme significance today" (322 I.C.C. at 773).

Notwithstanding that these complaints raised no issue of intermodal competition, it said that the rate-break rule precluded "bare-bone" pricing "in instances where unregulated competition would compel such action." (*id.*, 774)

It concluded that in order to give the railroads "greater opportunity for competitive initiative" in pricing, the mandatory rule should be vacated. And though the complaints had sought merely additional transit privileges under the present rates on limited movements, the Commission gave as an example of what might be done under its territory-wide modification in Docket 17000 Part VII "*restrictive* transit and routing provisions" providing "*a lesser service for a lower rate.*" (Emphasis supplied; 322 I.C.C. at 775.)

Petitions for reconsideration were filed by appellees and others August 3, 1964, coupled with a request that pending reconsideration the broad modifying order be vacated; replies to the petitions were filed August 17 to 24, and the petitions

were denied by order dated September 1, 1964. Vice Chairman Webb, whose dissent from the Commission's action is referred to by the district court,[18] voted to grant reconsideration, and Chairman Goff voted for a further hearing solely with respect to the vacation of the absolute rate-break rule.[19]

Meanwhile, after receiving the petitions for reconsideration and before they were passed upon, the Commission issued a notice that a "correction" would be made in footnote 1 of the title page of its report at 322 I.C.C. 743 to show that, in addition to the five complaint cases, Docket No. 17000 Part VII was indeed one of the proceedings in which the report was issued.

Decision of the District Court

In its memorandum opinion the district court states "that at no time did the Commission give any notice that it contemplated reopening Docket 17000 Part VII, nor * * * of the proposed modification of the orders of October 22, 1934 and March 4, 1936 to make observance of the 'rate-break' rule voluntary or permissive instead of mandatory throughout the entire Western district." (242 F. Supp. at 416)

The court noted that "the Commission's Report recognized that complainants' contentions related to a 'small but important segment of the traffic'," but that the Commission abolished the "absolute 'rate-break' rule not only as to the limited area covered by the five complaints but also throughout the entire Western district." (242 F. Supp. at 416)

The court also observed that the examiner's recommended report contained a statement of the limited issues raised by

[18] *Infra*, p. 14.

[19] Minute action of September 1, 1964.

complainants, "to which limitation of the issues no exception was taken"; and further, that "at one point during the proceedings before the Commission on the five complaints, the Secretary of Agriculture of the United States, an intervenor, requested that Docket 17000, Part VII, be included in the proceedings but the request was denied by the Commission" (*id.*, 416-417). The district court concluded by saying: "We agree with Vice Chairman Webb who stated in his dissent that 'No segment of the grain trade and no carrier had any reason to suppose that any such drastic action was within the scope of this proceeding'." (242 F. Supp. at 417)

Because both Section 16(6) of the Interstate Commerce Act and Section 4 of the Administrative Procedure Act require notice, the Commission's order was set aside. The district court expressly said that it was "not considering or passing on the question of whether" the outstanding orders in Docket 17000 Part VII "should be modified or changed in an appropriate proceeding by the Interstate Commerce Commission" (*id.*).

ARGUMENT

I

The Commission urges that the judgment of the court below would "narrow the choice of relief which the Commission may consider" in lengthy and intricate cases and that in this respect it is contrary to the specific holding of *Board of Trade of Kansas City v. United States*, 314 U.S. 534 at 547, in a situation claimed to be similar. There, the Commission now asserts (J.S. 10-11), this Court stated that even though the complaints to the Commission there involved sought "man-

datory relief" the Commission "had several choices before it" and "might have abolished the privilege of free transit entirely," a solution said to be exactly the opposite of that requested.[20]

The Commission's argument, however, incorrectly attributes the statements it quotes from *Board of Trade* as applying to the complaints there referred to. In discussing the choice of remedies available to the Commission following its "laborious investigation" into the grain rate structure (314 U. S. at 547), this Court was speaking not of choices available to the Commission in complaint proceedings but of the choices available under the Commission's general grain rate investigation at the time the territory-wide rate-break rule was prescribed, for immediately following that discussion the Court cites the Commission's initial report in that comprehensive proceeding, 164 I.C.C. 619, 698. The Court's reference following that citation, to giving the rate-break a "reasonable trial," likewise appears in the initial report in the general investigation, 164 I.C.C. 619, 698.

In contrast, the modifications sought in the complaint cases referred to in *Board of Trade*, were characterized in the Court's decision as embracing "only a minor phase" of the entire grain rate structure (314 U.S. at 548). And this characterization was made despite the fact that the complaints there, unlike the five complaints here, had been argued to the

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[20] The "mandatory relief" sought in the complaints there considered included an alternative request for either transit at primary markets on overhead rates through the markets *or* cancellation of the transit privilege on such rates at interior points. Also, Docket 17000 Part VII had then been specifically reopened in certain of its aspects. (231 I.C.C. at 794)

Commission following a reopening of Docket 17000 Part VII in certain of its aspects.[21]

Moreover, consistent with its practice the Commission in the instant case did not predicate its order of reopening and modification in Docket 17000 Part VII as responsive to the issues litigated in the five complaint cases. If the Commission had so intended, it would not have been necessary to refer, at it did (322 I.C.C. at 775), to Section 16(6) of the Act in purported justification of the action it was taking. As said in *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87:

> "The grounds upon which the administrative order must be judged are those upon which the record discloses that its action was based."[22]

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[21] See footnote 20, *supra*.

[22] Appellant railroads (C&NW J.S. 6 and at footnote 9) contend that for the Commission to give notice that a modification of the Docket 17000 Part VII orders in their general application was an issue for consideration "would have been contrary * * * to Commission practice," said to be "followed in over twenty years of cases * * * where modification of this same rule was handled, as here, under specific complaint dockets."

Appellants are in error. Where the application of the 17000 Part VII orders is attacked in a complaint covering specified traffic and there is, as in most cases, no broadening of the issues to cover traffic not embraced in the complaint, it has been the practice not to give notice that the modification of the 17000 Part VII orders in their application to the complained-of traffic is in issue. That is because, as stated in *Grain To, From and Within Southern Territory*, 259 I.C.C. 629, 693, in commenting on the Docket 17000 Part VII prescribed rate-break rule, the Commission said:

> "The findings were not intended to bar such exceptions to the rule as might be found necessary to its practical application and the avoidance of injustice in specific situations."

See, for example, *Royal Feed & Milling Co. v. Arkansas & L.M. Ry. Co.*, 281 I.C.C. 145, 152, where the complaints sought an exception from the rate-break rule, it was granted, no notice that the terri-

The Commission's collateral contention (J.S. 11) that the order which the district court here set aside granted "lesser relief" than that sought by the five complaints is answered both by the circumstance, as stated above, that the Commission did not rest its order on those complaints, and the important fact that the five complaints were limited to a small minority of the traffic, whereas the modification of the Docket 17000 Part VII orders attempted here would have affected also "the great majority" of the traffic moving through primary markets (322 I.C.C. at 755-6).

The district court's judgment is entirely consistent both with *Board of Trade*, which was decided in 1942 before enactment of the Administrative Procedure Act and with the Act itself.

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tory-wide 17000 Part VII orders were in issue appears from a description of the complaints in the report, and no general modification was made.

But where a territory-wide modification of the Docket 17000 Part VII general orders is contemplated which is not within the scope of a pending complaint, the practice is to give notice that Docket 17000 Part VII is being reopened for further consideration, and in what respect, and to afford interested shippers and carriers an opportunity to present data and argument, just as was done before the modification with respect to coarse grain was ordered effective. *Grain and Grain Products*, 298 I.C.C. 261, 262.

Compare *Nebraska-Colorado Grain Producers Assn. v. C., B & Q. R. Co.*, 243 I.C.C. 309, involving a complaint attacking grain rates from specified origins:

> "The Nebraska State Railway Commission contends that there is no necessity for the present Colorado-Nebraska origin group and asks that it therefore be broken up as it says was done with rates on classes and commodities generally. That cannot be done on this record, however, as the group rate is not in issue here. The group boundaries and rate were prescribed as a unit in the *Grain case*, and cancelation of the group would be proper only on a record broad enough to include all points in the group." (243 I.C.C. 330-331)

II

The Commission next asserts (J.S. 10-11) that the district court "reversed the Commission for doing precisely what the Supreme Court recently ordered the Commission to do in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115; and in *Burlington Truck Lines v. United States*, 371 U.S. 156." These cases hold that the Commission must exercise judgment in "choosing a proper remedy" (371 U.S. at 130).

Disregarding the question whether, upon finding that the rate-break rule and the charges resulting therefrom were not shown to be unlawful and then dismissing the complaints, the Commission still had authority to choose a remedy,[23] the choice made here was clearly outside the issues raised and litigated. Indeed, during the course of hearings in the complaint proceedings a reopening and modification of the Docket 17000 Part VII orders was specifically ruled out by the Commission itself;[24] hence the Commission's broad vacation of the mandatory rate-break rule was not an "allowable" choice. (*Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 612, cited by the Commission at J.S. 12)

Gilbertville expressly holds that the issue involved in a choice of remedies must be one upon which "the parties have been heard" (371 U.S. at 130).

The Commission's contention is without merit.

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[23] Cf. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U.S. 88, 92.

[24] Footnote 7, *supra*.

III

The Commission (J.S. 13-14) and the other appellants (C&NW J.S. 8-14) both contend that by participating in the five complaint proceedings appellees received actual notice of the issues involved in a broad reopening of Docket 17000 Part VII. These contentions, like those just discussed, overlook the limited nature of the five complaints, which the Commission and the parties recognized, and the significant action of the Commission during the hearing stage in expressly ruling out such a broad reopening and modification of orders in Docket 17000 Part VII.

In this connection appellants contend that *Civil Aeronautics Board v. State Airlines*, 338 U.S. 572, stands for the proposition that "predecisional notice of the relief * * * contemplated" in an agency proceeding is not required and that relief may be granted "even beyond the application before it" (Commission J.S. 12; C&NW J.S. 11). There it appeared that the applicant had requested authority to transport on "the routes detailed [in the applications] *or such modification of such routes as the Board may find public convenience and necessity require*" (emphasis supplied) and that applicant also requested "such other and further relief * * * as the Board may deem appropriate, and to which applicant may be entitled in any proceeding in which the application may be heard in part or in its entirety." The routes awarded applicant "were all in the same general area covered by the consolidated hearings" (338 U.S. at 577).

In sharp contrast, the five complaints involved in the instant case were expressly limited to specific routes and contained at the conclusion of the prayer for relief merely the stereotyped request set out in No. 1 of the Commission's

"Approved Forms" (49 U.S.C.A. page 340): "that such other and further order or orders be made as the Commission may consider proper in the premises." The Commission in the instant case did not make an order covering "the same general area" as that involved in the five complaints. Rather it attempted to cover a much broader area, and additional traffic substantially greater in volume than, and moving under different conditions from, the traffic in issue. Moreover, in the instant case the Commission had ruled out in the course of the administrative hearings the very issues on which it later undertook action, a situation completely dissimilar from that involved in *State Airlines*. That case is clearly distinguishable on its facts.

Similar distinguishing features are readily apparent from an examination of the additional authorities cited by appellant railroads and Omaha Grain Exchange on this point (C&NW J.S. 8-13).[25]

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[25] *City of Dallas v. Civil Aeronautics Board*, 221 F. (2d) 501 (D.C. Cir. 1954) cert. denied, 348 U.S. 914, follows *State Airlines*, discussed above, and is distinguishable on similar grounds.

Civil Rule 15(b) and *Branding Iron Club v. Riggs*, 207 F. (2d) 720 (C.A. 10th 1953) cover a situation where issues not raised by the pleadings are tried by consent. A like situation is not present here.

New York Central & H.R. Co. v. Interstate Commerce Comm'n, 168 F. 131 (C.C.S.D. N.Y. 1909) and *Tagg Bros. v. United States*, 280 U.S. 420, both antedating the Administrative Procedure Act, involved orders of an administrative agency made after a determination that existing rates were unlawful, and the question, unlike that presented here, was whether the method chosen to remove the unlawfulness was within the issues.

United States v. Pierce Auto Lines, 327 U.S. 515, 523-5, involved the Commission's consideration of rival motor carrier applications on a common record. Applicants operated over different segments of the route applied for, and provided joint service through interchange. The Commission granted both applications, and this Court held that neither the fact that the Commission dealt with

IV

Finally, the Commission argues (J.S. 14) that "the court below imposed upon the Commission a stricter notice standard than applies in civil actions in the district court," citing Rule 54 (c) of the Federal Rules of Civil Procedure. That rule provides in part:

> "* * * every final judgment shall grant the relief to which the party in whose favor it is rendered *is entitled*, even if the party has not demanded such relief in his pleadings." (Emphasis supplied.)

The rule does not provide that a judgment in a contested case shall grant relief to a party on an issue which is neither timely raised nor actually litigated and to which he is therefore not entitled. (cf. *United States v. 47 Bottles, More or Less, Etc.* (3rd Cir. 1963), 320 F. 2d 564, 573-4, cert. den. 375 U.S. 953). This contention, also, is without merit.

V

The vitality of appellee railroads as regulated industries and the economic life of the North Dakota appellees, who are shippers of grain or representatives of such shippers, de-

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both in one report nor that it granted both invalidated its order. The case is not pertinent.

In *Florida Citrus Comm. v. United States*, 144 F. Supp. 517 (N.D. Fla. 1956), affirmed per curiam 352 U.S. 1021, the Interstate Commerce Commission had before it a petition for increases in refrigeration charges. Hearings were held on the petition, a proposed report was issued, briefs filed, and oral argument allowed. The trial court found that "the party complaining had actual knowledge of and participated in the administrative proceedings," and therefore could not be heard to complain that he had no notice of the issues raised by the petition and embraced in the Commission's order allowing increases. The case is clearly distinguishable on its facts.

pend upon a lawful rate structure established and maintained under the standards of the Interstate Commerce Act and altered only pursuant to lawful procedures. (cf. *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472 (D.C. Ore. 1955), adhered to on reconsideration 134 F. Supp. 210.) Their specific interest in the maintenance of the absolute rate-break rule has already been pointed out (*supra*, pp. 6-7).

Though the June 5, 1964, order setting aside the absolute rate-break rule would have left appellees with the privilege of seeking suspension of individual grain rate proposals, that remedy would have been inadequate. Unless the appellees had challenged the Commission's action, violative of statutory procedure, in abrogating the mandatory rate-break rule in its broad application throughout the West, they would have been relegated to the task of contesting individual rate proposals in innumerable suspension proceedings. Many of such proceedings would not be terminated before the expiration of seven months, when the challenged rates would be permitted to go into effect (49 U.S.C. Section 15(7)). Even if appellees would then be successful, ultimately, in certain individual suspension cases—and this of course would be problematical under post-June 5, 1964 standards as set up by the Commission in its report—such success would not automatically reinstate the rule in areas or with respect to movements not in issue.

Regardless of the existence of alternative but ineffectual administrative remedies (*Greene v. United States*, 376 U.S. 149, 163), there is a well-recognized right to have the order of an administrative agency set aside in cases where procedural safeguards have been disregarded and the order is therefore void. *Morgan v. United States*, 304 U.S. 1, 15.

The June 5, 1964, order constituted rulemaking. Section 2(c) of the Administrative Procedure Act[26] provides in part as follows:

> "'Rule' * * * includes the approval or prescription for the future of rates, * * * prices, * * * or practices bearing upon any of the foregoing. *'Rule making' means agency process for the formulation, amendment, or repeal of a rule.*" (Emphasis supplied.)

The district court's memorandum opinion demonstrates that neither Section 4 of the Administrative Procedure Act[27] providing procedures for rulemaking nor Section 16(6)[28] of the Interstate Commerce Act was followed in this case.[29]

Since appellees and other shippers and carriers had no notice that the Commission was to consider the broad issues on which the order of reopening and modification was in fact predicated, they had no occasion to present data and argument on the very issues which were discussed by the Commission in the final three pages of its report, which deal with the broader questions. Specifically, the appellee railroads, in meeting the issues under the five complaint cases, which did not involve rate levels or intermodal competition, had no occasion to present evidence that not only was it possible under the rate-break system to meet the competi-

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[26] 5 U.S.C. Section 1001(c)

[27] 5 U.S.C. Section 1003

[28] 49 U.S.C. Section 16(6)

[29] At page 775 of the report two Commission precedents are referred to in purported justification of the procedure followed as being in compliance with Section 16(6). Neither *Grain and Grain Products*, 298 I.C.C. 261, nor *Increased Freight Rates, 1958*, 302 I.C.C. 665, however, is in point, for in each instance both notice and an opportunity to be heard on the issues actually determined were accorded (298 I.C.C. at 262; 302 I.C.C. at 673).

tion of unregulated transportation, but also the extent and manner in which such competition was actually being met within the Western district.[30] Likewise, there was no occasion to deal with the notion that the existing rate structure throughout the entire West was "static" in relation to the trend to "bare bones" pricing and in comparison with reductions made in other areas. (See 322 I.C.C. at 773-774.) But on proper notice it would have been the carriers' right to go into these subjects and show the vitality of the rates presently maintained under the rate-break system and the degree of flexibility which that structure now permits on movements throughout the West.

In such a comprehensive case the North Dakota appellees and other members of the shipping public would have had a chance to submit facts and views as to the effect of such a broad order upon the pricing and marketing of grain and its products throughout the West, not just the effect of an order granting relief in the five complaint cases.

Morgan v. United States, 304 U.S. 1, 18-19, and *Hill v. Federal Power Comm'n,* 335 F. (2d) 355, 363 (5th Cir. 1964), though involving the right to a statutory hearing rather than the right to submit data and argument under Section 4 of the Administrative Procedure Act, graphically illustrate the imperative necessity for notice of the issues to be determined by administrative agencies and an adequate opportunity to meet them.

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[30] See footnote 8, *supra,* quoting *Southeastern Association of Railroad and Utilities Comm'rs v. A. T. & S. F. Ry. Co.* (1964), 321 I.C.C. 519, 545-546.

CONCLUSION

In *Grain and Grain Products,* 298 I.C.C. 261, the Commission afforded both notice and an opportunity to present data, views and argument before determining whether to modify the outstanding rate-break orders affecting coarse grains and to what extent. It reached its conclusion in about a year—a shorter period than the instant case has been pending in the federal courts.

To insist, therefore, that the minimum requirements of the Administrative Procedure Act be complied with in the present situation surely raises no serious difficulties. Clearly the judgment of the district court must be affirmed.

Respectfully submitted,

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December 1965

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APPENDIX

1. "A flat rate is either a local rate of a single carrier or a joint rate of two or more carriers published as a unit and not dependent for application on any previous or subsequent transportation." (164 I.C.C. 619 at 633)

2. "A proportional rate is a * * * rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies; (3) or both." (*Id.* at 633)

3. "An overhead rate with transit is a * * * rate under which shipments may be stopped at an intermediate point for marketing, milling, or other recognized transit purpose, and in the absence of which the through charge would be the lowest combination of applicable rates to and from the transit point." (*Id.* at 633)

4. "A transit balance is an incident of an overhead through rate with transit. Shipments are billed inbound to the transit point at the flat rate. On the outbound shipment the amount paid is the difference between the through rate from the point of origin to final destination and the flat rate from the point of origin to the transit point. This difference is known as the transit balance." (*Id.* at 633)

5. "Primary markets" are those large grain centers from which proportional rates are published. (*Board of Trade of Kansas City v. United States*, 314 U.S. at 535; *Grain and Grain Products*, 164 I.C.C. at 635)

6. On a "rate-break" basis grain is moved on a combination of the rate to the primary market and the proportional rate from the primary market to another market or to final destination. (*Board of Trade* case, *supra*, at 539)

7. Interior transit points are transit points other than primary markets. (*Board of Trade* case, *supra*, at 535-536)

8. Referring to the transit privilege, this Court said in *Board of Trade* at 538-539:

> "This privilege was available in the primary markets under two different rate schemes: (1) the 'overhead through rate' and (2) the 'rate-break combination.'
>
> "(1) An overhead through rate is the rate from an originating point to the final destination, or to a gateway like Chicago, via a particular point. Thus, on a shipment of grain from Enid, Oklahoma, to Chicago via Kansas City, the overhead through rate was 38.5 cents per hundred pounds. Under this rate, grain reaching Kansas City could receive the various privileges of transit upon payment of 23.5 cents (the local rate from Enid to Kansas City) upon the inbound shipment, and the difference (known as the 'transit balance') between the overhead through rate, 38.5 cents and the 23.5 cents inbound rate, upon the outbound shipment.
>
> "(2) On a 'rate-break' basis, however, grain moved on a combination of the local or flat rate from the originating point to the primary market and the 'proportional' rate from that market to a gateway or the final destination. The primary markets therefore came to be known as 'rate-break' points. The 'proportional' rate, representing an average of transit balances under overhead through rates, was designed to offset the competitive advantages of lines going through rate-break points as against lines starting there. The significance of the rate-break combination lay in the fact that for many points of origin there were no overhead through rates. In the above example, the proportional rate on outbound grain shipments from Kansas City to Chicago was 17.5 cents. The applicable rate on a shipment of grain from an originating point having no through rate to Chicago via Kansas City, with or without transit at Kansas City, was a combination of the local rate to Kansas City and the proportional rate from Kansas City to Chicago."

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No. 751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL.,

Appellants,

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,

Appellees.

REPLY TO MOTION TO AFFIRM

While the motion to affirm by appellees Burlington et al. fails almost entirely to meet the points stated in our jurisdictional statement (J.St.) and that of the Government in No. 752, certain assertions made in that motion (cited hereafter as "M.A. . .") require this brief reply.

1. APPELLEES CANNOT CONVERT THIS CASE INTO A QUESTION OF FACTUAL NOTICE.

Attempting to obscure this novel construction of the Administrative Procedure Act, appellees make an elaborate effort to convert this case into an unappealing factual controversy by arguing that "[t]he sole question decided by the court below was whether or not notice was given." (M.A. p. 5.) But the district court, in its discussion of Section 4(a) of the Administrative Procedure Act (J.St. App. A-5) holds that, the statute notwithstanding, "[t]hese [appellees] were entitled to clear, decisive notice of the Commission's contemplated enlargement of the issues . . .," notice which the court held could not be ascribed to them though they were all present and participated in all five

complaint cases (*ibid*). Thus the three-judge court was required to construe Section 4(a) contrary to its plain language in order to set aside the I.C.C. order subject of this appeal.

The explicit language of Section 4(a) and its unambiguous legislative history (J.St. 11-13), which appellees do not dispute, required no additional notice of rule-making[1] to change rates where the carriers involved were already named parties to a proceeding where those rates were in controversy. The plain fact is that Section 4(a)[2] says specifically that the actual notice given here is sufficient. Still the court below found this notice not sufficient, holding that in addition appellees "were entitled to clear, decisive notice," presumably by publication in the Federal Register, since it relies upon Section 4(a). While the three-judge court

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1. We concede that the lower court correctly construed I.C.C.'s order vacating the mandatory aspect of rate-break to be rule-making. There is no question here that such rule-making was a completely proper way for the Commission to dispose of the case. *Securities & Exch. Comm'n.* v. *Chenery Co.*, 332 U.S. 194 at 202-203.

2. Section 4 provides:

"(a) NOTICE.—General notice of proposed rule-making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

(J.St. App. A at A-5 to A-6) purports to overturn the Commission upon its construction of Section 4(a), it imputes to the statute elements never enacted by the Congress.

2. APPELLEES' OTHER PROCEDURAL ARGUMENTS REST UPON FALLACIOUS FACTUAL ASSERTIONS.

A. The Commission Conformed Completely To Its Prior Practice In These Cases, And Stayed Strictly Within The Geographic Scope Of The Complaints.

Appellees can point to *no* case (M.A. at 16-17) where the Commission, in over twenty years of administering the rate-break rule, has noticed up proposed rule-making in order to modify the rule other than the single case[3] where the rule was not then presently subject of a complaint by shippers, a situation unlike this proceeding. Their theme, as brought out by the *Nebraska-Colorado* case,[4] returns inevitably to the contention, which the district court found persuasive (J.St. App. A-2 to A-4), that vacation of the mandatory aspect of the rule "not only as to the limited area covered by the five complaints but also throughout the entire Western district[,]" somehow enlarged the scope of the cases and unfairly surprised appellees. To lay to rest once and for all any such argument, on the page following we set out a true copy of Exhibit 119-A-1 from the record, showing in black and white print (as it was received in evidence before the Commission) the rate-break structure

3. *Grain and Grain Products*, 298 I.C.C. 261, cited at M.A. p. 17, note 22.

4. *Nebraska-Colorado Grain Producers Ass'n.* v. *C.B. & Q. R.R.*, 243 I.C.C. 309, cited at M.A. p. 17, note 22.

of gathering and intermarket proportional rates,[5] as well as rate-break markets[6] and the major rail gateways for grain. Added to Ex. 119-A-1 by the red overlay are the rate-break rates and routes which were attacked in the consolidated complaints. Each rate and route is cited in specific detail to the complaints (listed in Appendix A to this Reply Brief) placing it in issue. Even the most casual inspection of this exhibit illustrates that rate-break rates and routes to, from or through *every* rate-break market throughout the Western district were indisputably in issue, and that the Commission in vacating mandatory compliance with the rule throughout the Western district stayed strictly within the geographic bounds of the controversy.

B. The Examiner Did Not And Could Not Limit Issues To Be Considered By The Commission.

Next, appellees Burlington et al. assert (at M.A. pp. 13-14) that the Commission's hearing examiner somehow "limited issues raised by complainants," to less than the lawfulness of the rate-break rule generally and confining the case to "a 'small but important segment of the traffic'" (M.A. at p. 13).[7] As we pointed out, however, the rate-break rule was in issue generally under the literal language of the complaints,[8] an understanding confirmed by all

5. The structure is explained at J.St. App. C, pp. 747-751, and in Ex. 119 at pp. 1-4.

6. The rate-break or primary markets shown are indicated by gray shading which was not done on the original of Ex. 119-A-1, and the omission of complainants Atchison and Leavenworth, Kansas, and St. Joseph, Missouri, conforms to the Commission's practice (J.St. App. C at 744) of using Kansas City, Mo.-Kan., as representative of all four markets.

7. This contention, too, seemed persuasive to the three-judge court (J.St. App. A-4).

8. See note 6 on page 6 of the Commission's Jurisdictional Statement in No. 752.

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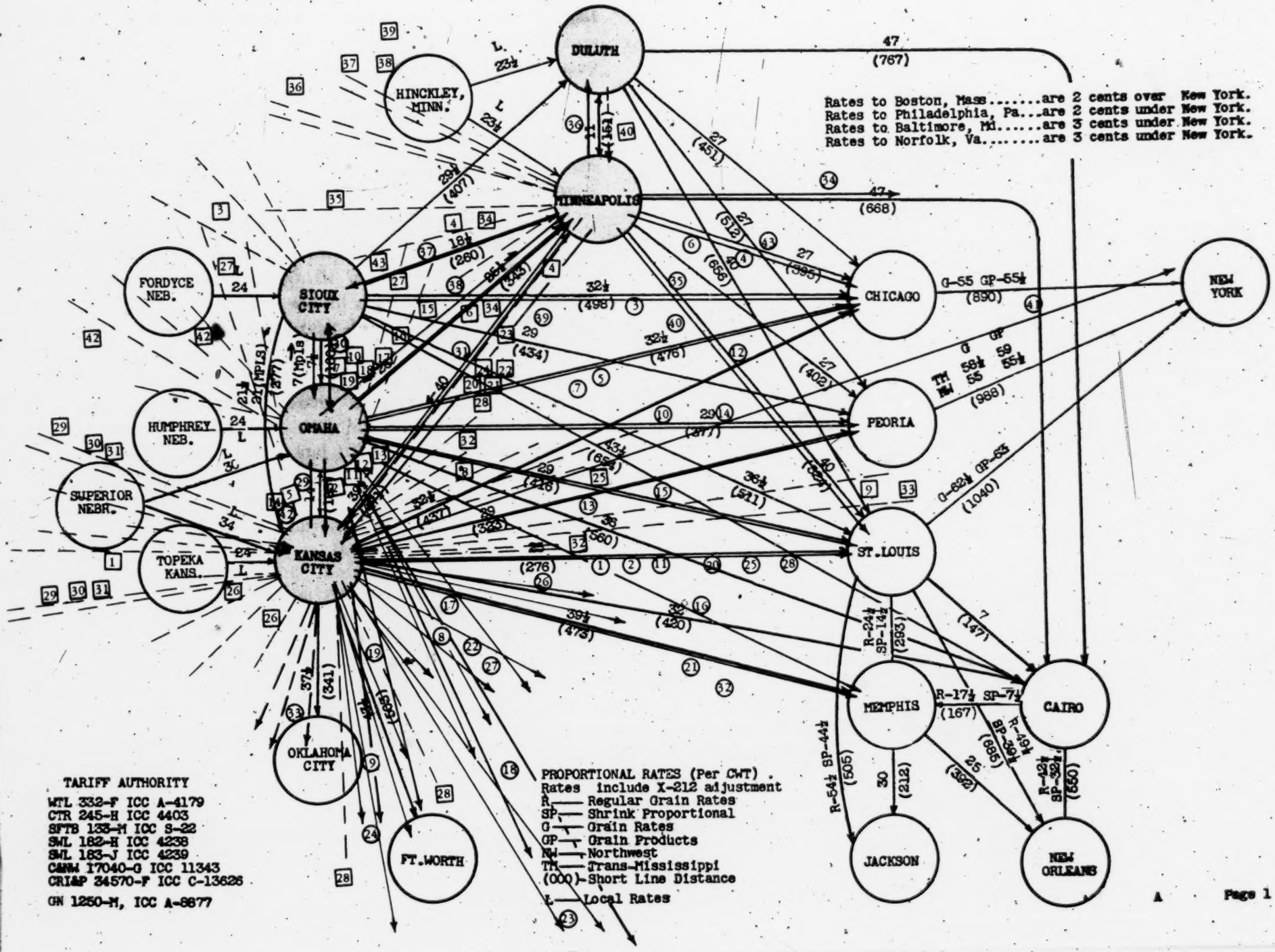

TARIFF AUTHORITY

WTL 332-F ICC A-4179
CTR 245-H ICC 4403
SFTS 133-M ICC S-22
SWL 182-H ICC 4238
SWL 183-J ICC 4239
C&NW 17040-G ICC 11343
CRI&P 34570-F ICC C-13626
GN 1250-M, ICC A-8877

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parties (J.St. p. 7) and the Examiner.[9] Section 8(a) of the Administrative Procedure Act[10] categorically provides that "On . . . review of the initial decisions of [hearing] officers the agency shall, except as *it* [emphasis supplied] may limit the issues by notice or rule, have all the powers which it would have in making the initial decision." As this Court ruled in *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358 at 364, under such statutes the agency itself has the power of ruling on facts and policies in the first instance, a ruling wholly hostile to appellees' assertion here.

Appellees apparently attach considerable significance to the fact that both North Western[11] and Secretary of Agriculture Freeman[12] sought specifically (and unsuccessfully) to raise the rate-break docket generally in the case. Appellees argue (M.A. at p. 20) that "the Commission had ruled out . . . the very issues on which it undertook action."[13] But appellees were present when the witness for North Western introduced Ex. 130, his testimony asking specifically (Ex. 130, pages 5 and 10) that the Commission "require the vacation of the outstanding orders in connection with Docket 17000 Part 7 . . .," and they raised no objection (R. 1250) to this testimony. It has long been the law, codi-

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9. At the Prehearing Conference the examiner stated (Prehearing R. 16) without contradiction his understanding that:

> "One of the complainants[']contentions, in all these proceedings, is that the absolute rate-break rule is an illegal proceeding, of itself, and in that respect all of these proceedings are similar."

10. 5 U.S.C. 1007(a).

11. M.A. at pp. 9-10.

12. M.A. at p. 10.

13. The three-judge court seemed to find some significance in this action also (J.St. App. A-4).

fied by Federal Civil Rule 15(b) as to judicial proceedings,[14] that failure to object to testimony treats any issue raised therein as if it were part of the pleadings. *United States* v. *Cushman,* 136 F.2d 815, 817 (9 Cir. 1943), *cert. denied* 320 U.S. 786; *Branding Iron Club* v. *Riggs,* 207 F.2d 720, 724 (10 Cir. 1953); cf. *Liverpool & London & Globe Ins. Co.* v. *Gunther,* 116 U.S. at 126-127 (decided under New York law). This is so even if at the trial leave to plead the issue is specifically denied, so long as no objection is raised when the evidence is submitted. *United States* v. *Cushman,* 136 F.2d 815 at 817 (9 Cir. 1943), *cert. denied* 320 U.S. 786; 3 MOORE, FEDERAL PRACTICE, ¶ 15.13. While appellees attempt to distinguish these cases (M.A., p. 20, note 25), contending that no "consent" was given here, the above decisions uniformly imply such consent where in testimony an issue is raised without objection.

Thus even if these complaints had not specifically requested the Commission to prescribe new rules in lieu of rate-break (and they did, as is shown in the I.C.C. Jurisdictional Statement in No. 752, at note 6 on p. 6), appellees' failure to object to the repeated requests for vacation of rate-break at the hearing placed the point squarely in issue under many settled decisions.

While appellees argue (M.A. at pp. 23-24) that carrier competition and rate-break rate rigidity were not properly in the case, and that "on proper notice it would have been the carriers' right to go into these subjects (*id.* at 24);" the fact is that throughout the hearing they made a full record

14. 3 MOORE, FEDERAL PRACTICE, ¶ 15.13; see *Nashua Savings Bank* v. *Anglo-American Co.,* 189 U.S. 221, 231.

on these issues,[15] and they requested no opportunity of the Commission after entry of the order in question to present any additional evidence as was their right.[16] Their failure to do so forecloses assertion of this afterthought, under well-settled decisions of this Court. *United States* v. *Tucker Truck Lines*, 344 U.S. 33 at 36-37; *United States* v. *Capital Transit Co.*, 338 U.S. 286 at 291.

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15. By their own witnesses appellees brought in much testimony on carrier competition (e.g. at R. 1026-1027, Ex. 123, pp. 2-3, Ex. 109, pp. 3-4) and through extensive cross-examination of shipper witnesses (e.g. at R. 1430-1462; R. 1469-1471), all of which testimony tended to show that shippers "received considerabl[y] more money for unloading trucks (R. 1026-27);" varying from 10-12¢ per bushel (R. 1428) to from 6-9¢ a bushel (R. 1429), depending upon markets. Likewise, the issue of whether rate-break rates were related to costs of service was first specifically injected into the case by appellees' own witnesses (R. 715-717; Ex. 70, pp. 2, 4-8 and 16; Ex. 71, pp. 2-5, 5-8, 8-10 and 10-12; Ex. 88, pp. 2-3, 4-5, 5-8 and 8-12).

16. Rule 101 of the Commission's General Rules of Practice (49 C.F.R. 1.101) permits petitions for further hearings or reconsideration in any case. In the petitions filed by these appellees they sought only reconsideration on the record as made, and at no time did they ask for rehearing on any point, or to introduce any evidence such as they suggest now to be appropriate.

3. CONCLUSION

Cutting through the clutter of appellees' assorted factual allegations, there remains for resolution one significant public law question. As we have shown (at J. St. pp. 8-14), in order to reverse the Commission here the district court was compelled to construe Section 4(a) of the Administrative Procedure Act contrary to its literal language, its legislative history, and all prior precedent.

Since this unprecedented ruling threatens to seriously impair the Commission's decisional function,[17] and could be applied across the board to hamper administrative agencies generally, these appeals should receive plenary consideration by the Court.

Respectfully submitted,

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January, 1966

17. The Commission so states at page 16 of its Jurisdictional Statement in No. 752.

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APPENDIX A.

I Transit Arrangements Which Complainants Requested the Commission to Establish in this Proceeding.

Primary Market Traffic on which Transit Balances Apply[1] (1)	Origin of Inbound Billing Producing Transit Balances on Traffic Shown in Col. (1)[2] (2)	Reference to Complaint or Exhibit in this Proceeding Demanding Transit Producing Transit Balances on Col. (1) Traffic Upon Submission of Inbound Billing From Col. (2) Origins (3)
1. Kansas City to St. Louis	Southern Nebraska points	Docket 33338, paras. VI (f), VI (g) and VI (l) as supplemented by complainants' Exhibit 22
2. Kansas City to St. Louis	Omaha	Docket 33338, para. VI (c) and Docket 33397, para. VI (f)
3. Sioux City to Chicago	South Dakota points	Exhibit 60, pp. 9-10 of Sioux City Market, Intervenor
4. Minneapolis to Chicago	Minnesota and South Dakota points south of C&NW line from Mankato, Minn. to Pierre, S. D.	Docket 33397, para. VI (b) and Docket 33469, para. VI (b)
5. Omaha to Chicago	Kansas City	Docket 33338, para. VI (d) and Docket 33397, para. VI (g)
6. Minneapolis to Chicago	Omaha	Docket 33397, para. VI (a) and Docket 33469, para. VI (a)
7. Omaha to Chicago	Sioux City	Docket 33338, para. VI (a)

	Primary Market Traffic on which Transit Balances Apply[1]	Origin of Inbound Billing Producing Transit Balances on Traffic Shown in Col. (1)[2]	Reference to Complaint or Exhibit in this Proceeding Demanding Transit Producing Transit Balances on Col. (1) Traffic Upon Submission of Inbound Billing From Col. (2) Origins
	(1)	(2)	(3)
8.	Kansas City to Arkansas points.	Iowa points	Docket 33338, para. VI (i)
9.	Kansas City to Texas points ...	Illinois points	Complainants' Exhibit 82
10.	Omaha to Peoria	Sioux City	Docket 33338, para. VI (a)
11.	Kansas City to St. Louis	Sioux City	Docket 33338, para. VI (b)
12.	Kansas City to Chicago	Omaha	Docket 33338, para. VI (c) and Docket 33397, para. VI (f)
13.	Kansas City to Peoria	Omaha	Docket 33338, para. VI (c) and Docket 33397, para. VI (f)
14.	Omaha to Peoria	Kansas City	Docket 33338, para. VI (d) and Docket 33397, para. VI (g)
15.	Omaha to St. Louis	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
16.	Omaha to Memphis	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
17.	Omaha to Arkansas points	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
18.	Omaha to Louisiana points	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)

	Primary Market Traffic on which Transit Balances Apply[1]	Origin of Inbound Billing Producing Transit Balances on Traffic Shown in Col. (1)[2]	Reference to Complaint or Exhibit in this Proceeding Demanding Transit Producing Transit Balances on Col. (1) Traffic Upon Submission of Inbound Billing From Col. (2) Origins
	(1)	(2)	(3)
19.	Omaha to Texas points	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
20.	Kansas City to St. Louis	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
21.	Kansas City to Memphis	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
22.	Kansas City to Arkansas points.	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
23.	Kansas City to Louisiana points	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
24.	Kansas City to Texas points ...	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
25.	Kansas City to St. Louis	Iowa and Missouri points	Docket 33338, paras. VI (g) and VI (1)
26.	Kansas City to Missouri points.	Kansas points	Docket 33338, para. VI (h)
27.	Kansas City to Arkansas points	Minnesota and South Dakota points	Docket 33338, para. VI (i) as supplemented by Complainants' Exhibit 24

Primary Market Traffic on which Transit Balances Apply[1]	Origin of Inbound Billing Producing Transit Balances on Traffic Shown in Col. (1)[2]	Reference to Complaint or Exhibit in this Proceeding Demanding Transit Producing Transit Balances on Col. (1) Traffic Upon Submission of Inbound Billing From Col. (2) Origins
(1)	(2)	(3)
28. Kansas City to St. Louis	Texas points	Docket 33338, para. VI (j)
29. Kansas City to Omaha	Kansas and Colorado points	Docket 33338, para. VI (k)
30. Kansas City to Sioux City	Kansas and Colorado points	Docket 33338, para. VI (k)
31. Kansas City to Minneapolis	Kansas and Colorado points	Docket 33338, para. VI (k)
32. Kansas City to Memphis	Iowa and Missouri points	Docket 33338, para. VI (l)
33. Kansas City to Oklahoma points	Illinois points	Complainants' Exhibit 82
34. Minneapolis to Milwaukee ..... and other Lake Michigan gateways	Omaha and Sioux City	Docket 33397, para. VI (a) and Docket 33469, para. VI (a)
35. Minneapolis to St. Louis	Iowa, Minnesota and South Dakota points	Docket 33397, para. VI (b) and Docket 33469, para. VI (b)
36. Minneapolis to Duluth	North Dakota and South Dakota points	Docket 33397, para. VI (c) and Docket 33469, para. VI (c)
37. Minneapolis to Sioux City	Minnesota and South Dakota points	Docket 33397, para. VI (d) and Docket 33469, paras. VI (d) and VI (f)
38. Minneapolis to Omaha	Minnesota and South Dakota points	Docket 33397, para. VI (d) and Docket 33469, paras. VI (d) and VI (f)
39. Minneapolis to Kansas City	Minnesota and South Dakota origins	Docket 33397, para. VI (d) and Docket 33469, para. VI (d)
40. Minneapolis to St. Louis	Duluth	Docket 33397, para. VI (e) and Docket 33469, para. VI (e)
41. Kansas City to Eastern points..	Southwestern Iowa and Northwestern Missouri points	Docket 33397, para. VI (i)
42. Omaha to Kansas City	Colorado, Wyoming, Nebraska, Kansas and Iowa points	Docket 33171
43. Minneapolis to Chicago	Sioux City	Docket 33397, para. VI (a) and Docket 33469, para. VI (a)

[1] Where the destination is a gateway the transit balances would also apply to all traffic moving beyond to destinations to which the through rate is the gateway combination.

[2] The origins shown in this column are those appearing as origins on the waybills. Where a primary market appears in this column, transit balances will be established on movements described in Column 1 not only on submission of billing from the market shown here but also from origins from which the rates to the primary market shown in Column 1 are constructed as combinations over the market shown here. Thus, in item 2, for example, transit balances will be established on the Kansas City-St. Louis movement not only on submission of Omaha billing but on submission of billing from any point from which the rate to Kansas City is the Omaha combination.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 752

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

OPPOSITION TO THE MOTION TO AFFIRM

Appellees' motion alleges that the question presented by this appeal is "so unsubstantial as not to need further argument" (p. 2), then proceeds to show that the interests affected by this proceeding are indeed substantial and nowhere disproves that the ruling below imposes a substantial burden on the administrators of the Interstate Commerce Act. It may be that no further argument is needed in this proceeding for the reason that the error below is so patent.

The decision below has three elements, any one of which imposes new and burdensome notice requirements on the Commission in grain-rate proceedings. The court below requires "clear, decisive notice," of what is "contemplated" by the Commission, that is predecisional notice of the likely outcome of the rate proceeding. It holds in the same sentence that the relief here granted, which in fact followed the suggestion of the Chicago and North Western Ry. Co. made during the course of the proceeding, is an "enlargement of the issues in the proceeding." Finally, it would require notice, not only of the relief "contemplated" by the Commission, but of the "proposed amendatory action in Docket 17000, Part VII," as if such additional action was necessary as a matter of law, rather than administratively convenient, before the Commission could lawfully vacate the rate-break rule. (J.S. 6a). In each of these facets of the decision, the court below clearly erred.

Just as in *Board of Trade* v. *United States*, 314 U.S. 534, 547, so here, "the Commission had several choices before it." Appellees claim this Court made that statement with respect only to the general investigation (164 I.C.C. 619), and not with reference to the subsequent complaints, such as are here involved. Yet, immediately following this Court's reference to the general investigation it repeated that "all of the proposed remedies" were properly before the Commission when it decided to give the rate-break rule a "reasonable trial" in the complaint proceeding, 229 I.C.C. 9 (314 U.S. at 547-48).

No notice was required of the formal reopening of Docket 17000, Part VII. The appellees were given notice of the subject matter of the proceeding in the complaints, and repeated notice during the course of the proceeding that at least the North Western desired relief from the entire rate-break requirement, albeit under the docket numbers of the five complaints. The Commission's order under these docket numbers was legally enforceable, and its choice to preserve an orderly docket by further amending orders in Docket 17000 made no further substantive change. The amendment of orders in Docket 17000, Part VII, was a procedural order which Section 4(a) of the Administrative Procedure Act expressly exempts from its notice requirements (60 Stat. 238, 5 U.S.C. 1003(a)).[1]

We demonstrated in the jurisdictional statement that appellees were on actual notice that the rule might be vacated so as to allow the railroads to propose changes in rates on a case by case basis. The rule was attacked in the complaints served on the appellees; and the North Western specifically requested vacation of the rule. Appellees point to various portions of the Commission's report to suggest that the complaints were considered on narrower grounds (Motion, p. 7). Even if it were true that few specific rates (the "rate break combinations") were attacked

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[1] It might be further argued that the decision vacating the rate-break rule under the docket numbers of the five complaints was also a procedural change, for it approved no change in the status quo, but was made to encourage the filing of rates for review on a case by case basis. (322 I.C.C. at 774-75; C. & N. W. J.S. App. C., at 774-75).

in the complaints, this would not be material; for, as the Commission found, "certain complainants allege that the absolute rate-break rule . . . is an unjust and unreasonable regulation" (322 I.C.C. at 757; C. & N.W. J.S., App. C., at 757), and broadly requested relief from such regulation.[2]

Appellees were on actual notice throughout this hard-fought, five-year proceeding, that the Commission might vacate the mandatory rate-break order to allow greater initiative among the grain-carrying railroads, including the appellee railroads, to propose innovations in the grain rate structure. Appellee railroads apparently do not want this freedom of initiative, but neither they nor any other appellee are prejudiced in having it, nor by the manner in which it was granted.[3]

We respectfully submit that for the Commission to discharge its "duty of being responsive to the dynamic character of transportation problems," as this Court emphasized in *Board of Trade* (at 546), it must retain a wide choice of remedies at the decisional

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[2] It is also true that the Department of Agriculture requested a reopening of Docket 17000, Part VII, during the present proceeding, which was denied; but the petition was denied for the reason that the Department had requested a complete investigation of the grain rate structure, and not merely an investigation of the rate break requirement.

[3] Appellants renew their contentions, that the decision below unlawfully imposes procedures more exacting than the Federal Rules of Civil Procedure (*cf. L. & N. R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 227); and that such decision flatly contravenes the ruling of the Supreme Court in *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572.

stage of these complex and fluid grain rate adjustments. The decision below unduly narrows the choice of remedy and imposes new and heavy decisional and predecisional burdens on the agency in these cases.

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January 1966

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